No. 808 SUPREME COURT.

Supreme Court, U.S.
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BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

For the District of Columbia Circuit

No. 14103

MORRIS MAC SCHWEBEL,

Appellant,

vs.

ANDREW D. ORRICK, HAROLD C. PATTERSON, EARL F. HASTINGS, ET AL.,

Appellees.

Appeal from an Order and Judgment of the United States District Court for the District of Columbia

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United States Court of Appeals
For the
District of Columbia Circuit

FILED OCT 1 1957

Joseph W. Stewart

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CHESTER T. LANE,
150 Broadway,
New York 38, N. Y.,
Counsel for Appellant.

Statement of Questions Presented

1. Whether the Securities and Exchange Commission has any jurisdiction to institute disbarment proceedings in the absence of express statutory authority and in the absence of any rule or regulation of its own creating a bar or similar register of attorneys.

2. Whether the institution of such a proceeding is in any event subject to the provisions of Section 9(b) of the Administrative Procedure Act.

3. Whether the requirements of Section 9(b) are satisfied by the issuance of a formal Notice of and Order for Hearing instituting the proceeding, without the prior written notice and opportunity called for by that section.

4. Whether the terms of the exception in Section 9(b) for "cases of willfulness" are met by framing the formal Notice in the minimum language necessary to sustain the validity of an indictment, and whether if so the Notice in this case was so framed.

5. Whether resort to the courts under Section 10 of the Administrative Procedure Act before rather than after the illegal procedure is completed is timely.

TABLE OF CONTENTS

	PAGE
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATUTES AND RULES INVOLVED	5
STATEMENT OF POINTS	5
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. The Commission is Without Jurisdiction to Maintain the Proceeding Which This Action was Instituted to Enjoin	8
II. The Commission's Proceeding Against Appellant is in Violation of Section 9(b) of the Administrative Procedure Act	20
III. The Court Below Properly Accepted Jurisdiction of This Action	42
CONCLUSION	44
APPENDIX OF STATUTES AND REGULATIONS	45

Citations

Cases:

Aberdeen Bindery v. *Eastern States P. and Pub. Co.*, 166 Misc. 904, 3 N. Y. Supp. 2d 419 (1938)	17
Air Transport Associates v. *Civil Aeronautics Board*, 91 App. D. C. 147, 199 F. 2d 181 (1952), cert. den. 344 U. S. 922	37
Allen v. *Grand Cent. Aircraft Co.*, 347 U. S. 535 (1954)	42
Camp v. *Herzog*, 104 F. Supp. 134 (D. C. 1952)	12, 13, 14, 15, 18
Clark v. *Austin*, 101 S. W. 2d 977 (Mo. 1937)	8

PAGE

Goldsmith v. *U. S. Board of Tax Appeals*, 270 U. S. 117 (1926) 10, 11, 16, 26
Great Sweet Grass Oils, Ltd., and Kroy Oils, Ltd., Securities Exchange Act Release No. 5483, April 8, 1957 ..... 2, 40, 42
Great Western Food Distributors v. *Brannan*, 201 F. 2d 476 (C. A. 7, 1953) 37, 38, 39

Herman v. *Dulles*, 92 App. D. C. 303, 205 F. 2d 715 (1953) 11, 13, 15, 18, 19, 21, 22
Howenstine v. *United States*, 263 Fed. 1 (C. A. 9, 1920) 35

Manning v. *French*, 149 Mass. 391, 21 N. E. 945 (1889) 10
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938) 7, 42

Okin v. *Securities and Exchange Commission*, 137 F. 2d 398 (C. A. 2, 1943) 9

People v. *Goodman*, 366 Ill. 346, 8 N. E. 2d 941 (1937), cert. den. 302 U. S. 728 8
Price v. *Johnston*, 334 U. S. 266 (1948) 17

Schlemmer v. *Buffalo, R. & P. R. Co.*, 205 U. S. 1 (1907) 36
Shortz v. *Farrell*, 193 A. 20 (Pa. 1937) 8
Spokane & I. E. R. Co. v. *United States*, 241 U. S. 344 (1916) 36
Sterling Securities Co., Securities Exchange Act Release No. 5527, June 5, 1957 34

Tumulty v. *Rosenblum*, 134 N. J. L. 514, 48 A. 2d 850 (1946) 8

United States v. *Renken*, 55 F. Supp. 1 (D. C. S. C. 1944) 35, 36

Van Dorn, In the Matter of, 3 S. E. C. 258 (1938) .. 11

PAGE

Statutes:

Administrative Procedure Act

Sec. 2(e) 20, 22, 45
Sec. 3(a) 1, 4, 45
Secs. 5, 7, 8 21
Sec. 6(b) 1, 4, 46
Sec. 9(b) 1, 3, 4, 5, 6, 7, 20, 22, 24, 25, 26, 27, 28, 30, 31, 33, 34, 35, 36, 38, 39, 42, 46
Sec. 10 ..... 1, 6, 47

Banking Act of 1933
Sec. 30 27

Federal Food, Drug, and Cosmetic Act
Sec. 304(a) 32, 36
Sec. 305 32

New York Civil Practice Act
Sec. 236 17

Securities Act of 1933
Sec. 19(a) 9

Securities Exchange Act of 1934
Sec. 13 2
Sec. 23(a) 11, 48

Trust Indenture Act of 1939
Sec. 319(a) 9

5 U. S. C. § 261 9
§ 493 9

28 U. S. C. § 1291 2
§ 1292 2
§ 1331 1
§ 1654 17
§ 2201 1

35 U. S. C. § 32 9

38 U. S. C. § 101 9
§ 102 9

PAGE

Miscellaneous:

Constitution of the United States, Fifth Amendment 1

Legislative History, Administrative Procedure Act, 79th Congress, 1944-46 (S. Doc. 248, 79th Cong., 2nd Sess.) 23, 24, 26, 29, 30, 31, 32, 33, 34

Regulations of Immigration and Naturalization Service, C. F. R., Title 8, Ch. 1, § 95.7(h)..... 18

Regulations on Practitioners, Department of the Interior, § 1.7(a) 18

Report to the Congress on Legal Services and Procedure, by the Commission on Organization of the Executive Branch of the Government, March 1955, p. 58 29

Rules of Practice of Securities and Exchange Commission

Rule II(a) 15, 16
Rule II(b) 14, 15, 16, 24
Rule II(c) 15, 16
Rule II(e) 3, 4, 5, 16, 24
Rule II(f) 9

Rules of Procedure of Post Office Department, § 202.6(h) 18

United States Court of Appeals

For the District of Columbia Circuit

No. 14103

MORRIS MAC SCHWEBEL,

Appellant,

vs.

ANDREW D. ORRICK, HAROLD C. PATTERSON, EARL F. HASTINGS, JAMES C. SARGENT,

Appellees.

BRIEF FOR THE APPELLANT

Jurisdictional Statement

This is a civil action arising under the Administrative Procedure Act, Act of June 11, 1946, c. 324, Sections 3(a), 6(b) and 9(b), 60 Stat. 238, 240 and 242, 5 U. S. C. §§ 1002 (a), 1005(b) and 1008(b), and the "due process" clause of the Fifth Amendment to the Constitution of the United States. The Complaint for Injunction and Declaratory Judgment was filed in the United States District Court for the District of Columbia on June 24, 1957 (Jt. App. 1a-7a).

Jurisdiction in the District Court was invoked under 28 U. S. C. §§ 1331 and 2201, and Section 10 of the Administrative Procedure Act, 5 U. S. C. § 1009.

On July 9, 1957, the parties were heard in the District Court on motions by the appellant for a preliminary injunction and by the appellees for an order dismissing

the action because the complaint failed to state a claim upon which relief could be granted and because the court lacked jurisdiction over the subject matter. On July 18, 1957, the District Court entered its Order and Judgment granting the appellees' motion to dismiss the action and denying appellant's motion for a preliminary injunction (Jt. App. 55a). Notice of appeal from said Order and Judgment was filed on July 26, 1957 (Jt. App. 56a).

This Court has jurisdiction of the appeal by virtue of 28 U. S. C. §§ 1291 and 1292.

Statement of the Case

In late 1956 the Securities and Exchange Commission (hereinafter sometimes referred to as the "Commission") initiated what are commonly known as "delisting proceedings" against two Canadian oil companies, charging that certain reports filed by them under Section 13 of the Securities Exchange Act of 1934, 48 Stat. 894, 15 U. S. C. § 78m, contained false and misleading statements. After hearing, the Commission on April 8, 1957, issued an order directing that the registrations of the securities of the two companies on the American Stock Exchange be withdrawn (*In the Matter of Great Sweet Grass Oils, Ltd., and Kroy Oils, Ltd.*—Securities Exchange Act Release No. 5483, April 8, 1957). Petitions for review of the Commission's order are now pending in this Court.

Following the completion of the *Great Sweet Grass* proceedings before it the Commission on May 6, 1957, promulgated a document entitled "Notice of and Order for Private Hearing Pursuant to Rule II(e) of the Rules of Practice." This document (Jt. App. 8a-13a), after reciting that appellant was an attorney practicing before the Commission and at all times mentioned therein had

acted as American counsel for Great Sweet Grass Oils, Ltd., and Kroy Oils, Ltd., charged that appellant in connection with his representation of these oil companies and of certain securities dealers in the United States had engaged in certain specified activities or inactivities which in the Commission's view constituted unethical and unprofessional conduct. The order fixed June 10, 1957,[1] as the date for a private hearing for the purpose of taking evidence on the charges, to determine whether appellant should be temporarily or permanently disqualified from and denied the privilege of appearing or practicing before the Commission pursuant to Rule II(e) of its Rules of Practice. Appellant was required by the order to file his answer to the matters specified therein on or before June 3, 1957.[2]

On June 10, 1957, appellant filed with the Commission a motion to dismiss its disciplinary proceeding against him on the ground of want of jurisdiction; and on June 17, 1957, appellant further moved to dismiss the proceeding on the ground that the same had been instituted in violation of Section 9(b) of the Administrative Procedure Act, 60 Stat. 242, 5 U. S. C. § 1008(b). These motions were denied in a Memorandum Opinion and Order issued on June 20, 1957 (Jt. App. 19a-28a). By the same order the times to answer and to appear for hearing were further extended to July 1 and July 8, 1957, respectively.

Appellant commenced the action now before this Court on appeal by filing his complaint in the court below on June 24, 1957. The complaint, which named as defendants the then four incumbent members of the Securities and Exchange Commission, was served also on the Attorney General of the United States and the United States Attorney for the District of Columbia. No answers have as yet been served.

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[1] Subsequently extended to June 24, 1957.
[2] Subsequently extended to June 10, 1957.

Briefly stated, the grounds for relief set forth in the complaint (Jt. App. 1a-7a) are that the appellees are without authority in law to institute or continue the pending disciplinary proceeding against appellant or to issue any order disciplining him, and that in any event the institution of the proceeding was in violation of Section 9(b) of the Administrative Procedure Act. The complaint seeks a permanent injunction against further prosecution of the proceeding, and a declaratory judgment that Rule II(e) of the Commission's Rules of Practice (under which the proceeding was purportedly instituted) is invalid and not authorized by law, and that appellees' actions in instituting and continuing the proceeding were in violation of Section 9(b) (as supplemented by Sections 3(a) and 6(b)) of the Administrative Procedure Act.

Following the filing and service of the complaint appellant moved the court below for a preliminary injunction. The appellees countered by moving to dismiss the action (1) because the complaint fails to state a claim upon which relief can be granted, and (2) on the ground that the court lacks jurisdiction over the subject matter. The motions were argued together on July 9, 1957, and on July 12, 1957, the court rendered its opinion (Jt. App. 46a-54a), holding, in effect:

> 1. That in the particular circumstances of this case the appellant had the right, without first exhausting such further administrative remedies as might be available to him, to secure a judicial determination of the validity of the Commission's Rule II(e) and of the Notice of and Order for Hearing purportedly issued thereunder, and that the court accordingly had jurisdiction of the subject-matter.
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> 2. That the Commission's Rule II(e) constitutes a valid exercise of the rule-making power conferred on it by statute.

3. That the Commission's right to proceed against appellant was conditioned by the requirements of Section 9(b) of the Administrative Procedure Act, but that the Commission had met those requirements.

Accordingly, the court concluded (Jt. App. 54a) that the complaint should be dismissed, and that it followed that appellant's motion for a preliminary injunction should be denied. An Order and Judgment to this effect was entered on July 18, 1957 (Jt. App. 55a). Notice of Appeal was filed on July 26, 1957 (Jt. App. 56a).

Hearing in the disciplinary proceeding which is the subject of this action has by agreement of the parties been postponed pending disposition of this appeal.

Statutes and Rules Involved

Pertinent portions of the Administrative Procedure Act and the Securities Exchange Act of 1934 are set forth in a separate appendix and pertinent portions of the Commission's Rules of Practice are set forth as Exhibit B to the complaint (Jt. App. 14a-15a).

Statement of Points

1. Rule II(e) of the Commission's Rules of Practice constitutes an invalid and ineffective exercise of such statutory power as the Commission may have to discipline attorneys appearing and practicing before it.

2. The Commission's Notice of and Order for Hearing was invalid under Section 9(b) of the Administrative Procedure Act by virtue of the Commission's failure, prior to the institution of the proceeding, to call to appellant's attention facts or conduct which the Commission thought might

warrant action against him and to accord him opportunity to demonstrate or achieve compliance with lawful requirements.

3. Appellees have failed to sustain the burden of establishing that in instituting the proceeding against appellant they were entitled to avail themselves of the exception provided in Section 9(b) for "cases of willfulness".

4. Appellant has already been subjected to and will continue to be subjected to grave and irreparable injury by virtue of appellees' unlawful institution of a disciplinary proceeding against him, and has no adequate remedy therefor in any court. Accordingly, Section 10 of the Administrative Procedure Act authorizes the District Court and this Court to review and restrain such unlawful action.

5. The Order and Judgment of the court below should accordingly be reversed in so far as it grants appellees' motion to dismiss the complaint; and because there is no material issue of fact and appellant's right to a preliminary injunction depends solely on questions of law which should be decided in appellant's favor, this Court has jurisdiction to and should reverse also the lower court's denial of appellant's motion for a preliminary injunction and should either grant such an injunction, or remand with directions that it be granted.

Summary of Argument

Case law has thoroughly established that federal adminstrative agencies require express or implied statutory authority to conduct disciplinary proceedings against attorneys and others practicing before them. If the authority is only implied, rather than express, such proceedings can be validly conducted only if the implied authority has been implemented by agency rules prescribing the qualifications

of those permitted to practice, and providing for discipline of those who fail to maintain those qualifications. It is appellant's position that the Commission's Rule II of its Rules of Practice, entitled "Appearance and Practice before the Commission", does not meet the standards laid down by the courts as necessary to validate disciplinary proceedings under implied statutory authority, in that it not only establishes no bar or comparable register but fails to prescribe in any meaningful terms the qualifications of those permitted to practice.

Appellant argues also, and the court below held, that the validity of the Commission's proceeding depends upon compliance with Section 9(b) of the Administrative Procedure Act. However, the court below held that the promulgation of the Commission's Notice of and Order for Hearing complied with the requirements of Section 9(b), and that in any event the matter fell within the stated exception to Section 9(b) for "cases of wilifulness". It is appellant's position that the court below was in error in both respects, and that its conclusions were in plain disregard of both the language of the statute and its legislative history.

The foregoing being purely questions of law, and irreparable injury to appellant being apparent, we contend, and the court below agreed, that the case is not one governed by *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, but that on the contrary appellant's resort to the courts in this action was timely, and he is entitled herein to a determination of these questions. We reserve the right to further argument on this issue after filing of the brief on behalf of appellees.

Finally, though it may be that disposition of appellant's motion below for a preliminary injunction automatically followed the court's dismissal of the complaint, without independent consideration of the motion's merits, we urge

that if this Court should reverse the dismissal of the complaint it should also pass upon appellant's right to a preliminary injunction as prayed below, since there are no material questions of fact and only issues of law are involved.

ARGUMENT

I

The Commission is without jurisdiction to maintain the proceeding which this action was instituted to enjoin.

We take it to be an indisputable proposition, not contested below nor questioned by the lower court in its opinion, that the jurisdiction of a federal administrative agency to discipline or disbar attorneys appearing or practicing before it must find its source in some clear statutory authorization, and cannot be merely assumed from the agency's quasi-judicial authority to hold hearings in the administrative areas legislatively committed to its care.[3]

Congressional recognition of this limitation may certainly be deduced from the several instances in which the Congress has, by specific legislative action, authorized certain individual administrative agencies to take disciplinary action, including disbarment, against persons practicing before them. For instance, Congress has done so in the

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[3] Indeed, some state courts (though not, to our knowledge, any federal courts) have gone so far as to hold that prescribing qualifications for administrative practice by lawyers is an inherent juidicial function which cannot competently be conferred on administrative agencies even by express statute. See, e.g., *Tumulty* v. *Rosenblum*, 134 N. J. L. 514, 48 A. 2d 850 (1946); *Shortz* v. *Farrell*, 193 A. 20 (Pa. 1937); *People* v. *Goodman*, 366 Ill. 346, 8 N. E. 2d 941 (1937), cert. den. 302 U. S. 728. For a comprehensive discussion of the conflicting considerations, see also *Clark* v. *Austin*, 101 S. W. 2d 977 (Mo. 1937).

case of the Patent Office, providing by statute both for revocation by the Office of a lawyer's right to practice before it and for judicial review of such revocation. 35 U. S. C. § 32. Comparable specific authorizations have also been granted by Congress to the Treasury Department (5 U. S. C. § 261), the Administrator of Veterans' Affairs (38 U. S. C. §§ 101, 102), and the Interior Department (5 U. S. C. § 493), although in the case of these three agencies no express statutory provision is made for judicial review of their disciplinary actions.

The Securities and Exchange Commission enjoys no such express statutory authority to deny, temporarily or permanently, the privilege of attorneys to practice before it. The authority, if it exists, must be found in some necessary implication from powers otherwise expressly conferred on the Commission by Congress.

We are not here concerned with the authority of the Commission to exclude from a particular hearing an attorney, or any other person, guilty of disorderly or contemptuous conduct. That authority plainly inheres in the right and duty of all legally constituted tribunals to protect the dignity and decorum of their authorized proceedings (*Okin v. Securities and Exchange Commission*, 137 F. 2d 398, C. A. 2, 1943), and may properly be implied from the Commission's express powers to hold hearings under its several statutes and its express powers to adopt such rules and regulations "as may be necessary to carry out" (Securities Act of 1933, § 19(a), 48 Stat. 908, 15 U. S. C. § 77s) or "as it may deem necessary or appropriate in the public interest or for the protection of investors to carry out" (Trust Indenture Act of 1939, § 319(a), 53 Stat. 1173, 15 U. S. C. § 77sss)[4] the regulatory provisions of its constituent legislation. This is the right, and duty, exercised by the Commission under Rule II(f) of its Rules of Practice (Jt. App. 15a).

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[4] Each of the Commission's other statutes contains similar power to hold hearings and adopt adjective regulations.

What we are concerned with here is the quite separate question of whether in the absence of express statutory authority a federal administrative agency enjoys the right to suspend temporarily or disbar permanently from practicing before it an attorney admitted to practice and in continued good standing as such under the laws of some competent state or federal jurisdiction.

Case law on this subject appears to have originated with the Massachusetts case of *Manning* v. *French*, 149 Mass. 391, 21 N. E. 945 (1889), cited with approval by the Supreme Court of the United States in *Goldsmith* v. *U. S. Board of Tax Appeals*, 270 U. S. 117 (1926). As said in the *Manning* case (Mass. p. 399):

> If the court had the power to prescribe by rule the qualification of attorneys to be admitted to practise before it, the court had the power to determine whether the persons who asked to be admitted had the requisite qualifications, and whether persons who had been admitted retained the requisite qualifications. *The power of the court to determine whether an attorney already admitted was a fit person to remain an attorney, is involved in the general power to make rules for the admission of attorneys.* * * * (Emphasis supplied.)[5]

Similarly, the Court in the *Goldsmith* case (*supra*) observed, at page 122:

> * * * the general words by which the board is vested with the authority to prescribe the procedure in accordance with which its business shall be conducted include as part of the procedure rules of practice for the admission of attorneys.

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[5] As the Supreme Court of the United States pointed out in the *Goldsmith* case, at p. 123, the agency involved in the *Manning* case, altbough called a "court", was "rather a commission to aid the fulfilment of an international award with judicial powers."

It would thus appear to be settled law that if an agency acting pursuant to statutory authority establishes by rule the qualifications of those entitled to practice before it, and establishes a bar composed of persons possessing those qualifications, it may proceed to suspend or expel from that bar those whom it subsequently finds no longer retain the requisite qualifications.[6]

In the light of the decisions of the Supreme Court in the *Goldsmith* case and of this Court in *Herman* v. *Dulles*, 92 App. D. C. 303, 205 F. 2d 715 (1953), it would appear also to be settled that the statutory authority needed for the establishment of a bar need not be express, but may properly be implied from a general statutory power such as the Commission's, under the Securities Exchange Act of 1934, "to make such rules and regulations as may be necessary for the execution of the functions vested" in it by the statute.[7]

Conversely, it has been held (and we know of no contrary decisions) that even though possessing statutory

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[6] See also *In the Matter of Van Dorn*, 3 S. E. C. 267 (1938), a decision rendered at a time when the Securities and Exchange Commission maintained a register of enrolled attorneys and agents:

> The power of the Commission to prescribe rules of practice and to admit as attorneys or agents only those applicants who measure up to certain standards is clear. Manning v. French, 149 Mass. 391, 21 N. E. 945 (1889); Goldsmith v. Board of Tax Appeals, 270 U. S. 117, 46 Sup. Ct. 215 (1926). A corollary of the power to make such rules and to erect such standards is the power to suspend or disbar for misconduct. Bradley v. Fisher, 80 U. S. (13 Wall.) 335, 354 (1871); In re Robinson, 48 Wash. 153, 92 Pac. 929 (1907); Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021 (1909). * * * * (p. 269.)

[7] Securities Exchange Act of 1934, Section 23(a), 15 U. S. C. §78w(a). The Commission's Rules of Practice are not adopted specifically under this statute; but comparable authority may be found in each of the Commission's five other enabling statutes.

authority, an administrative agency is without jurisdiction to suspend or exclude from practice before it unless it has first adopted appropriate rules "the effect of which is to limit those who appear before it as attorneys, agents or representatives to such persons as are admitted or enrolled". *Camp* v. *Herzog*, 104 F. Supp. 134, 139 (D. C. 1952). A suspension order by the National Labor Relations Board was accordingly vacated.

Plainly concerned with the implications of Judge Morris's opinion in *Camp* v. *Herzog*, Government counsel sought modification of its language. This Judge Morris refused, but he added in amplification the following statements (p. 140):

> It is true that the Court had no intention of making a determination respecting the type or form of any rule concerning admission, enrollment, registry or the institution of a bar of attorneys, agents or representatives permitted to practice before the Board. It clearly was the intention of the Court to make clear that the power to impose the disciplinary sanction of suspension or permanent exclusion of any person permitted to practice before the Board must find its source in legislative action by statute or rules promulgated by the Board pursuant to statute; that the statutory power to prescribe rules of procedure should be, and has been construed to give to the Board the power to make rules respecting the admission of persons qualified and permitted to practice before it, and that power comprehended the power to suspend or exclude persons that fail to maintain the qualifications of those so permitted. * * * It is the view of the Court that the power to discipline those practicing before it is essentially related to the power of the Board to regulate by rule those who are permitted to practice before it. Whether such permission is accomplished by an enrollment, a register or the constitution of a bar, or otherwise, was not a matter calling for decision of the Court in this case.

It will thus be seen that Judge Morris expressly left open the question of what form of "rule [regulating] those who are permitted to practice before it" would be sufficient to sustain the related and consequential power to discipline.

Shortly thereafter this Court in *Herman* v. *Dulles,* 92 App. D. C. 303, 205 F. 2d 715 (1953), considered and sustained the disbarring jurisdiction of the International Claims Commission (which had been established by statute in the Department of State), upon a showing that that Commission had created a register, based not only on admission to a state, District of Columbia, or United States Supreme Court bar, but also on the filing of an affidavit covering a variety of matters and a written authorization from the claimant. The significance of this register as distinguishing the case from *Camp* v. *Herzog* was stressed by Government counsel in their brief in this Court:

> The basis of the authority of an administrative agency to discipline attorneys is clearly illustrated in the *Camp* case. There Judge Morris held that the National Labor Relations Board was *without authority to discipline an attorney in as much as it had not promulgated any rule respecting the admission of attorneys to practice before it.* But in so doing he was careful to point out that where as here the agency has promulgated such a rule its power is undisputed. • • • (P. 15; emphasis supplied.)
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> • • •
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> • • • The instant case fits squarely within the holding of the *Goldsmith* and *Camp* cases. Here by virtue of 22 U S C § 1622(c) "The Commission may prescribe such rules and regulations as may be necessary to enable it to carry out its functions • • • ". Pursuant to this statutory grant it promulgated several months prior to the institution of this proceeding Rule 300.4 governing the admissions of attorneys and Rule 300.6 governing disciplining attorneys. This then fulfills the requirements of the *Goldsmith* and *Camp* decisions. Nor can appellant distort the plain meaning of these decisions by urging as he does (Brief, p. 66) that they require the Commission to

> also have in addition rules of procedure governing disciplinary proceedings. They require solely a basic rule governing *admission and* disciplining of attorneys and appellant cannot amend the decisions to require more. (P. 16; emphasis supplied.)

In the light of the foregoing, the simple issue between the parties on this branch of the case is whether Rule II(b) of the Securities and Exchange Commission's Rules of Practice is a sufficient exercise of its authority to establish a bar to sustain its claim of power to suspend or disbar from it. Rule II(b) reads as follows:

> (b) A person may be represented in any proceeding by an attorney at law admitted to practice before the Supreme Court of the United States, or the highest court of any State or Territory of the United States, or the Court of Appeals or the District Court of the United States for the District of Columbia.

Appellees claimed below, and the court held, that by this rule the Commission had "adequately implemented" its statutory authority, the court saying further, on the authority of *Camp* v. *Herzog* (*supra*): "It is not essential that a roster of the bar be maintained, but is sufficient that the Commission has prescribed by regulation the qualifications for admission to practice before it" (Jt. App. 50a).

We respectfully submit that the court was in error. Rule II(b) does no more than express the truism that a lawyer is a member of a judicially established bar. We do not see how a rule expressing recognition of this obvious fact can be construed as constituting an exercise of "the power to make rules respecting the admission of persons qualified and permitted to practice before it", so as to support the further power "to suspend or exclude persons that fail to maintain the qualifications of those so per-

mitted".[8] And even if it were so construed, the only qualification which it prescribes is *membership in a bar, a membership which appellant maintains unimpaired.* Granting *arguendo* that appellant has been "permitted" to practice before the Commission, nothing has been alleged against him to question the continued existence of the fact upon which such permission was based.[9]

The matter may be more cogently tested by viewing Rule II(b) in its context—as part of a schematic index of the types of representation to which persons appearing before the Commission are entitled. We reproduce Rules II(a), (b) and (c) together:

> (a) An individual may appear in his own behalf, a member of a partnership may represent the partnership, a bona fide officer of a corporation, trust or association may represent the corporation, trust or association, and an officer or employee of a State commission or of a department or political subdivision of a State may represent the State commission or the department or political subdivision of the State, in any proceeding.
>
> (b) A person may be represented in any proceeding by an attorney at law admitted to practice before the Supreme Court of the United States, or the highest court of any State or Territory of the United States, or the Court of Appeals or the District Court of the United States for the District of Columbia.

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[8] See *Camp* v. *Herzog, supra,* 104 F. Supp. at 140.

[9] We recognize that the charges which this Court upheld in *Herman* v. *Dulles, supra,* as sufficient to justify expulsion from the International Claims Commission's formally constituted bar were not related to a failure to maintain the conditions upon which admission to the Commission's bar had been predicated. In this respect we think the decision went beyond, and is inconsistent with the reasoning of, prior applicable decisions.

> (c) A person shall not be represented at any hearing before the Commission or a hearing officer except as stated in paragraphs (a) and (b) of this rule.

As indicated by Rule II(c), Rules II(a) and (b) are to be read *in pari materia*. Together they cover the entire spectrum of representation before the Commission. If one confers upon the persons named therein permission to appear, so must the other. If improper conduct or lack of integrity or character justifies excluding persons "permitted" under one, it must similarly justify excluding persons "permitted" under the other. If one creates a "bar", so must the other. It is no answer that one deals with attorneys at law and the other does not; as *Goldsmith* v. *U. S. Board of Tax Appeals, supra*, 270 U. S. 117, shows, the power to regulate practitioners in no way depends on the practitioners' being lawyers. And Rule II(e) is not confined to appearances in a representative capacity.

The consequence, then, of appellees' argument, and of the opinion below, is that if Rule II(b) justifies proceedings under Rule II(e) against all lawyers, so must Rule II(a) justify such proceedings against all individuals—all individuals in the United States. So poor an attempt at selectivity is inherently inconsistent with any theory that the Commission by these rules was establishing or even thought it was establishing anything remotely resembling a bar—even the most amorphous bar which might conceivably satisfy the tests laid down by Judge Morris.

Moreover, if the decision below were sound, it must follow from it that any individual cited to appear before the Commission, and undertaking to appear *in propria persona* under Rule II(a), would be subject to disciplinary proceedings under Rule II(e), looking to an order thereunder barring him thereafter from representing himself, if the Commission should (as normally would be the case

of persons whom it cited to appear before it) regard him as "lacking in character and integrity." Yet the right of individual self-representation in legal proceedings is an inherent right of human liberty, recognized by statute and finding its roots in the common law.[16] In discussing the New York statute on the subject, a New York court has said:

> * * * Individual litigants have always had the right to prosecute and plead in propria persona. By the ancient common law, a party cited to appear was required to do so in person, and it was only after such appearance that he might, with the consent of the court, be represented by attorney. Beecher's Case, 8 Coke 58a, 77 Reprint 559; Beecher v. Shirley, Cro. Jac. 211, 79 Reprint 183; Com. Dig. Atty. B. 4. If the right of personal appearance by an individual should be denied, such denial will be regarded as an abuse of personal liberty. Obviously, there were individual litigants before there were lawyers.
>
> *Aberdeen Bindery* v. *Eastern States P. and Pub. Co.*, 166 Misc. 904, 3 N. Y. S. 2d 419, 422 (Sup. Ct., App. Term. 1st Dept., 1938).

See also *Price* v. *Johnston*, 334 U. S. 266, 285.

We cannot believe that this Court will sustain a decision which by its unavoidable implication must authorize the Securities and Exchange Commission to engage in so drastic an incursion into the field of human rights.

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[16] See 28 U. S. C. § 1654, Act of June 25, 1948, c. 646, 62 Stat. 944, as amended by Act of May 24, 1949, c. 139, § 91, 63 Stat. 103; New York Civil Practice Act, § 236.

In summary, while we must recognize, on the authority of *Camp* v. *Herzog* and *Herman* v. *Dulles*, *supra*, the power of the Commission to protect the purity of its own bar, the Commission has in fact and in law no bar. What the Commission is doing here is rather seeking to protect the purity of the general bar—that bar consisting of all lawyers admitted to practice before the Supreme Court of the United States or the highest court of any state or territory or the higher courts of the District of Columbia. That purity has traditionally been the concern of the courts and the bar associations. Courts and bar associations are equipped by long experience to judge the proper professional equipment and qualifications of attorneys—in a sense in which lay bodies such as the Securities and Exchange Commission cannot be.[11]

If it be argued that the Commission is not seeking to purify the bar, but only to protect itself against contamination of its own processes by one whom it charges with having engaged in unprofessional conduct in matters relating to the Commission's own proceedings, the answer is two-fold. In the first place, a Commission order of disqualification or denial in this case would reach beyond its proceedings to those of other administrative agencies. See, e.g., Regulations of the Immigration and Naturalization Service, C. F. R., Title 8, Ch. 1, § 95.7(h), Post Office Department Rules of Procedure, § 202.6(h), Department of the Interior Regulations on Practitioners, § 1.7(a), each of which in substance provides for disbarment of attorneys who have been suspended or disbarred by another federal administrative agency.

Moreover, even courts do not in general enjoy the power the Commission seeks to exercise here. A court,

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[11] We use the term "lay" in no derogatory sense, but as denominating a Commission which, so far as legal requirements are concerned, could properly be composed entirely of non-lawyers.

like an administrative agency, may exclude unruly practitioners from particular proceedings before it, since otherwise the machinery of the law could not operate. A court (though generally not a commission) may exercise the inherent power to cite and punish for contempt. But even a court cannot commonly exclude a practitioner, duly admitted to the bar in the pertinent jurisdiction, from participation in future proceedings before it merely because it has not admired his conduct in one such proceeding. Such power is commonly reserved to the court by which the practitioner was admitted to the bar, and exercised through disbarment proceedings, not through *ad hoc* exclusionary proceedings before the particular judge out of whose court the complaint arose.

If our conclusion is sound, it does not follow that the Commission is without remedy. If the Commission really feels that it has a grievance against the appellant which would support invocation of the time-tried tests of proper professional conduct on the part of the legal profession, it can refer the matter to the truly appropriate forum—the Grievance Committee of The Association of the Bar of the City of New York—the body legally constituted for first instance consideration of the professional conduct of members of the bar of the State of New York.[12]

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[12] In *Herman* v. *Dulles*, cited *supra*, p. 11, the agency involved, even though having, as it was held, the power to revoke membership in its bar, elected to submit the record of its hearing to a committee of the District of Columbia Bar Association before taking final action on a charge of unprofessional conduct by an attorney. *A fortiori* this should be done by an agency such as the Securities and Exchange Commission which has no bar.

II

The Commission's proceeding against appellant is in violation of Section 9(b) of the Administrative Procedure Act.

The pertinent portion of Section 9, 5 U. S. C. § 1008, reads as follows:

> Sec. 9. In the exercise of any power or authority—
>
> • • •
>
> (b) Licenses.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. • • •

The term "license" is defined in Section 2(e) of the Act (5 U. S. C. § 1001(e)) as follows:

> Sec. 2. As used in this Act—
>
> • • •
>
> (e) License and licensing.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant,

> renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

It is respectfully submitted that if (as of course we deny) the Commission has any jurisdiction to disqualify appellant from or deny him the privilege of appearing before it, as proposed in its Notice and Order (Jt. App. 13a), the taking of such action would be nothing less than the suspension or revocation of permission to practice before the Commission—in other words, suspension or revocation of a license within the meaning of Section 9(b).

In its opinion denying appellant's motions to dismiss the proceeding which it had instituted against appellant, the Commission rejected the application of Section 9(b) with the bland statement (Jt. App. 26a) that: "It has been judicially held that the Procedure Act does not apply to a proceeding brought by an agency to exclude an attorney from practice before it, * * *." To support the proposition the Commission cited only the decision of this Court in *Herman* v. *Dulles*, *supra*, 92 App. D. C. 303, 205 F. 2d 715 (1953).

True it is that this Court used the language quoted and emphasized in the Commission's opinion (Jt. App. 26a):

> * * * No statute creates the conditions that would make these provisions applicable to the disciplinary proceedings here involved.

Given the context of this quotation in the Commission's opinion, the reader would naturally suppose, as the Commission says, that this Court was referring to the requirements of the Administrative Procedure Act as a whole. This is plainly erroneous. A less careless reading of the *Herman* v. *Dulles* opinion should have made clear that the Court was referring solely to Sections 5, 7 and 8, which sections, the Court properly points out (205 F. 2d at 717),

are applicable by their terms only in proceedings "required by statute" to be determined "on the record after opportunity for an agency hearing." There being no such statutory requirement for proceedings to discipline attorneys practicing before the Securities and Exchange Commission, such proceedings, if otherwise lawful, may as this Court held be conducted without reference to the provisions in question. But the application of those provisions is not in issue here.

Counsel for appellees in the court below cautiously assigned more modest weight to *Herman* v. *Dulles*. After citing (in their brief, p. 20) the same passage as quoted by the Commission in its opinion (Jt. App. 26a), they comment only that:

> In view of the legislative history referred to, it is unlikely that Congress intended to include within the meaning of Section 9(b) of the Administrative Procedure Act the privilege to practice before an agency. * * *

Further research into the legislative history of the Act would have thrown more light on the intention of Congress in this particular respect. Thus, the Senate Committee on the Judiciary, in reporting out the bill which contained Sections 2(e) and 9(b) in the identical form as finally passed,[13] had the following to say:

> IV. Analysis of Provisions
>
> The following statements respecting each provision of the bill are designed to answer specific questions relating to language and objectives. * * *
>
> * * *
>
> Sec. 2. Definitions. * * *
>
> * * *

[13] Except for one comma in Section 2(e) which was inadvertently omitted in the final bill.

(e) LICENSE AND LICENSING.—*"License" is defined to include any form of required official permission such as certificate, charter, etc. "Licensing" is defined to include agency process respecting the grant, renewal, modification, denial, revocation, etc., of a license.*

• • •

SEC. 9. SANCTIONS AND POWERS.—*Section 9 relating to powers and sanctions refers to the exercise of any power or authority by an agency.*

Unlike sections 7 and 8, this section applies in all relevant cases, whether or not the agency is required by statute to proceed upon hearing or in any special manner. It also applies to any power or authority that an agency may assume to exercise.

• • •

(b) LICENSES.—*Agencies are required, with due regard for the rights or privileges of all the interested parties or persons adversely affected, to proceed with reasonable dispatch to conclude and decide proceedings on applications for licenses. They are not to withdraw a license without first giving the licensee notice in writing and an opportunity to demonstrate or achieve compliance with all lawful requirements, except in cases of wilfulness or those in which public health, interest, or safety requires otherwise.* • • •

This section operates in all cases whether or not hearing is required. • • •[14]

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[14] S. Rep. 752, 79th Cong., 1st Sess., Nov. 19, 1945. This can most readily be consulted in the compilation which Senator McCarran presented as Senate Document No. 248, 79th Cong., 2d Sess., July 26, 1946. The compilation is entitled "Administrative Procedure Act, Legislative History, 79th Congress, 1944-46", and in future citations in this brief will be referred to as "Legislative History". The quotations in the text will be found at pp. 195, 197, 211 thereof. For similar comment by the House Judiciary Committee, and by Senator McCarran and Representative Walter, the sponsors of the bill in the Senate and House, respectively, see Legislative History, pp. 254, 274-5, 323, 356, 368.

Nowhere in the legislative history, so far as we have been able to ascertain, can anything be found to suggest a narrowing of this broad intent of Congress to apply the provisions of Section 9(b) of the Act to "the exercise of any power or authority", without limitation of any kind, or particularly to justify excluding from that broad intent the type of proceeding involved in this case. Indeed, the essence of appellees' argument on the issue of their jurisdiction to disbar appellant is, and in the light of the authorities must be, that by their Rule II(b) they have granted a privilege or a license which under their Rule II(e) they may for cause revoke. In short, if Rule II(e) is valid, Section 9(b) of the Administrative Procedure Act must apply to its exercise. Appellees cannot have it both ways.

With the foregoing conclusion the district court agreed, saying in its opinion (Jt. App. 51a):

> As to the applicability of the notice provision of § 9(b) of the Administrative Procedure Act [footnote omitted], the term "license" as defined in Section 2(e) of the Act [footnote omitted] is broad enough to cover the right to practice before a government agency, which is a "form of permission" granted by the agency.

But the court nevertheless concluded that Section 9(b) is of no avail to appellant, for the reasons, first, that the case falls within the stated exception for "cases of willfulness," and, second, that the Commission had already, by promulgation of its "Notice and Order", in effect complied with the Act. We take up these two propositions in reverse order.

1. *Compliance.* The pertinent language of the court on this point reads as follows (Jt. App. 52a-53a):

> Further, it would appear that the Commission has, in effect, complied with the notice requirement

of §9(b). The pertinent sentence of that section is in essence a restatement of the concept of fair play legislatively applied to administrative proceedings through the Administrative Procedure Act. It requires only that *before suspension or revocation of any license the licensee shall be given written notice of the charges against him and an opportunity to meet such charges,* unless willfulness of the licensee or the public interest requires summary action. No particular form or duration of notice is specified, so that a fair notice and opportunity to reply must be inferred. (Emphasis supplied.)

We respectfully submit that the conclusion of Judge Keech rests on a simple misreading of the statute. In effect, he concludes that Section 9(b) requires no more than that before suffering a penalty for non-compliance with law a respondent shall have opportunity to be heard on the charges leveled at him. He would read out of the statute the requirement that the notice specified be given "prior to the institution of agency proceedings"—not prior to their termination by final agency action; and he would similarly read out the requirement that the licensee be accorded opportunity to *achieve,* as well as disjunctively to demonstrate, compliance with lawful requirements.

If the judge thought that "institution" of the proceedings occurred at some time later than the promulgation of the Commission's "Notice and Order"—so as to justify construing that document as a compliance with the statute—the Commission itself plainly had no such thought. At the opening of its "Memorandum Opinion and Order" denying appellant's motions to dismiss the proceeding before it, it recited (Jt. App. 20a):

> This is a private proceeding instituted under Rule II(e) * * *. We instituted the proceeding on May 6, 1957, * * * [the date of issuance of the "Notice and Order".]

Plainly the Commission's "Notice and Order", which in the Commission's own words "instituted the proceeding," gave appellant opportunity to "meet" the charges made against him by refuting them at a hearing, but none to avoid the institution of the proceeding, or its completion, by demonstrating or achieving compliance with the standards claimed to have been violated. Not even the Commission in its "Memorandum Opinion and Order", nor its counsel in the court below, suggested that its "Notice and Order" instituting the proceeding constituted compliance with Section 9(b) of the Administrative Procedure Act.[15]

In effect, the court below would equate the requirements of Section 9(b) to the standard due process or statutory requirements of notice and hearing which would in any event be applicable to agency disbarment proceedings (cf. *Goldsmith* v. *U. S. Board of Tax Appeals*, 270 U. S. 117, 123 (1926)). But the Act is not to be construed so narrowly. As said in the comments contained in the Senate Judiciary Committee Print of June 1945:[16]

> This subsection [Section 9(b)] is designed to ameliorate the difficulties where private parties are required to secure licenses. The first sentence requires that applications be determined promptly. The second sentence is designed to preclude the withdrawal of licenses, except in cases of willfulness or the stated cases of urgency, *without affording the licensee an opportunity for the correction of conduct questioned by the agency.* Similar provisions are now contained in the banking statutes, except that the latter provide in addition that stated periods of

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[15] The Commission and its counsel have relied on the inapplicability of the statute (rejected by the court below) and on the availability of the "urgency" exceptions (discussed *infra*).

[16] Legislative History, p. 35. The text of Section 9(b) as discussed by the Committee varied in minor verbal respects from the final Act, none affecting the point at issue.

> time—sometimes more than one period of warning—shall elapse prior to the revocation of the equivalent of licenses (Banking Act of 1933, secs. 20, 30 and 31, 48 Stat. 162, as amended, 12 U. S. C. 377, 77, and 71a; Federal Reserve Act, sec. 13, 38 Stat. 251, as amended, 12 U. S. C. 347; R. S. 5144, as amended, 12 U. S. C. 61). * * * (Emphasis supplied.)

It will be noted that in the quoted paragraph the Senatorial comment emphasizes the importance of "affording the licensee an opportunity for the correction of conduct questioned by the agency." Resisting the possible application of such a standard in a disbarment proceeding, appellees in their brief below observed (pp. 20-21)

> * * * Indeed, when a person, within the meaning of the Commission's Rule II(e), does not "possess the requisite qualifications to represent others" or is "lacking in character or integrity" or has "engaged in unethical or improper professional conduct" it would be impossible to determine how he could be "accorded an opportunity to demonstrate or achieve compliance with all lawful requirements," as Section 9(b) contemplates. * * *

We may pass without extended comment this extraordinary assumption of "guilt as charged" as a basis for disregarding procedural safeguards clearly enunciated by Congress as preludes to the institution of disciplinary proceedings. Rather, we should look to the models on which Congress explicitly patterned Section 9(b), particularly Section 30 of the Banking Act of 1933, as amended (48 Stat. 193, 12 U. S. C. § 77):

> *Removal of director or officer.*
>
> Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank * * * shall have continued to violate any law relating to such bank * * * or shall have continued unsafe or unsound practices in conducting the business of such bank * * * after having been warned

> by the Comptroller of the Currency * * * to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency * * * may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. * * * If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank * * * or has continued unsafe or unsound practices in conducting the business of such bank * * * after having been warned by the Comptroller of the Currency * * * to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. * * *

We respectfully suggest that the Commission's view (*supra*, p. 22) that "it is unlikely that Congress intended to include" such a proceeding as this under Section 9(b), and the conclusion of the court below that Section 9(b) imposes no more than the traditional agency responsibility to afford opportunity for notice and hearing before imposing sanctions, stem equally from a reluctance to face up to what Congress really meant, and said it meant. "It would be insupportable", the thought seems to be, "that one who has (or may have) violated the terms of a license should be allowed to resist discipline until he is warned and caught a second time. Is our administrative process to be shackled by the doctrine that every dog is entitled to one bite?"

Better, or less emotional, reasoning than this is, we submit, needed to justify overturning a plain mandate of Congress. Granted that if Section 9(b) is to be applied according to its terms the result may upon occasion be

that an unquestioned law violator may still continue to enjoy privileges if only he reforms after warning and before the institution of revocation proceedings against him. Congress has chosen this course as presumably less dangerous in the long run to the life of the community than permitting unbridled "crack-downs" without warning on the basis of charges which may or may not after hearing be sustained. As the Hoover Commission has recently said:[17]

> Administrative agencies possess extensive authority to condition the issuance of, and to revoke or suspend, licenses and similar grants of authority. The power to license is in effect the power to control the business and commercial life of the community. • • •

Whether the decision is wise is not for the courts to say. The decision has been made by the Congress, and absent constitutional inhibition, which has at no point been suggested, it is "the duty of reviewing courts to prevent avoidance • • • by any manner or form of indirection • • •."[18] The decision of the court below represents avoidance by indirection and in this respect should be reversed.

2. *Willfulness.* In much the same sense, we submit, the invocation by the court below of the exception for "cases of willfulness" represents avoidance of the statutory purpose. The court's observation on this point was as follows (Jt. App. 51a-52a):

> Whether or not § 9(b) applies to such revocation proceedings, the result in the case at bar is the same, for the court concludes that, at the very least, charge

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[17] Report to the Congress on Legal Services and Procedure, by the Commission on Organization of the Executive Branch of the Government, March, 1955, p. 58.

[18] Legislative History, p. 217.

"9" [20] falls within the class of cases involving "willfulness", which are excepted from the notice requirement. "Willfulness" as used therein has been interpreted as meaning the intentional doing of the act charged.[21] Following the rule applicable to an indictment,[22] the court holds that it is not essential for a specification of misconduct to include the word "willful" or "willfully" in order to charge a willful act if knowledge and intent are implicit in the facts recited. Although none of the nine charges uses the term "willfully" the facts alleged in many of them import an intentional act of omission or commission.

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[20] "9. Respondent testified on November 29, 1956, in Commission proceedings In the Matter of Great Sweet Grass and Kroy under Section 19(a)(2) of the Exchange Act that he never heard of Eurobrasil Trust and that he had no dealings with, or transactions with anybody connected with, Eurobrasil Trust. The record in the aforesaid proceedings reflects that on April 12, 1956 respondent placed an order with a member firm of the Exchange for the purchase of 20,000 shares of Great Sweet Grass stock, which order was for the account of Eurobrasil Trust."

[21] *Great Western Food Distributors* v. *Brannon*, 201 F. 2d 476, 484 (C. C. A. 7, 1953); *Air Transport Associates* v. *C. A. B.*, 91 U. S. App. D. C. 147, 153, 199 F. 2d 181, 186 (1953), cert. den. 344 U. S. 922.

[22] *United States* v. *Renken*, 55 F. Supp. 1 (D. C. S. C. 1944), aff. *Old Monastery* v. *United States*, 147 F. 2d 905, cert. den. 326 U. S. 734; *Howenstine* v. *United States*, 263 F. 1 (C. C. A. 9, 1920).

To understand the purpose of the exception we must revert once more to the legislative history.

The first definitive draft of the Administrative Procedure Act appears in the Senate Judiciary Committee Print of June, 1945. In this draft Section 9(b) appeared in substantially its present form with, however, slight variations of phraseology. As regards the exceptions to

the operation of Section 9(b)'s second sentence, the draft read:

> * * * Except in cases of clearly demonstrated willfulness or those in which public health, interest, or safety manifestly require otherwise, no withdrawal etc.[19]

Following discussions with the Attorney General and others, the Senate Committee revised the bill and reported it out favorably as Appendix A to S. Rep. 752, 79th Cong., 1st Sess., Nov. 19, 1945.[20] In this bill Section 9(b) had reached its final form—omitting the words "clearly demonstrated" before "willfulness" and the word "manifestly" before "require." In explanation, the Committee observed:[21]

> * * * The exceptions to the second sentence, regarding revocations, apply only where the demonstrable facts fully and fairly warrant the application of the exceptions. Willfulness must be manifest. The same is true of "public health, interest, or safety." The standard of "public * * * interest" means a situation requiring immediate action irrespective of the equities or injuries to the licensee, but the term does not confer upon agencies an arbitrary discretion to ignore the requirement of notice and an opportunity to demonstrate compliance. * * *

And, as touching on the general principles of interpretation and enforcement of the Act as a whole, the Committee observed (Legislative History, p. 217):

> It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used. For example, in several provisions the expression "good cause" is used. The cause so specified must

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[19] Legislative History, p. 35.
[20] Legislative History, pp. 187 *et seq.*
[21] Legislative History, pp. 211-212.

> be interpreted by the context of the provision in which it is found and the purpose of the entire section and bill. Cause found must be real and demonstrable. If the agency is proceeding upon a statutory hearing and record, the cause will appear there; otherwise it must be such that the agency may show the facts and considerations warranting the finding in any proceeding in which the finding is challenged. The same would be true in the case of findings other than of good cause, required in the bill. As has been said, these findings must in the first instance be made by the agency concerned but, in the final analysis, their propriety in law and on the facts must be sustainable upon inquiry by a reviewing court.

The draft having been submitted to the Attorney General for comment, his views were attached as Appendix B to the Report:

> Section 9: Subsection (a) is intended to declare the existing law. Subsection (b) is intended to codify the best existing law and practice. * * *[22]

After the bill had been passed in the Senate and introduced, "certain corrections and clarifications were written into the text," and a revision reported favorably by the House Committee on the Judiciary in H. R. Rep. 1980, 79th Cong., 2d Sess., May 3, 1946. Commenting on the exceptions in Section 9(b) (which had remained without change), the House Committee used substantially the same language as quoted above from the Senate Committee in S. Rep. 752, viz.:[23]

> * * * The exceptions to the second sentence, regarding revocations, apply only where the demonstrable

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[22] Legislative History, p. 229. It may reasonably be assumed that the Attorney General had in mind such existing "law and practice" as the Banking Laws cited by the Senate Committee, *supra*, pp. 27-28. Cf. also Sections 304 and 305 of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1044, 1045, 21 U. S. C. § 334(a), 335.

[23] Legislative History, p. 275.

> facts fully and fairly warrant their application. Willfulness must be manifest. The same is true of "public health, interest, or safety." The standard of "public * * * interest" means a situation where clear and immediate necessity for the due execution of the laws overrides the equities or the injury to the licensee; the term does not confer upon agencies authority at will to ignore the requirement of notice and an opportunity to demonstrate compliance. * * *

And finally, Representative Walter, as chairman of the subcommitttee handling the bill, explained in the course of debate on the bill's passage:

> Section 9(b) deals with licensing. It requires agencies to determine promptly all applications for licenses, prohibits them from withdrawing a license without first giving the licensee notice and an opportunity to achieve compliance except in cases of obvious willfulness or emergency * * *[24]

It is against this background that we must test the soundness of the lower court's conclusion that the exception for "cases of willfulness" is met by framing charges in language sufficient to sustain the validity of an indictment—i.e., in the court's analysis, if knowledge and intent to do the act charged are implicit in the facts stated (Opinion, Jt. App. 52a).

We submit that the unsoundness of this approach is clear. The Congressional history of Section 9(b), outlined above, shows beyond question an intent in Congress to give meaningful values to the exceptions it wrote into the license-revocation provision. Before the notice requirement may be avoided, willfulness or emergency must be "obvious"; they must be "manifest"; they must be fully and fairly warrant the application" of the exceptions (Legislative History, pp. 35, 211, 275, 368). The terms of

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[24] Legislative History, p. 368.

the exceptions do not "confer upon agencies an arbitrary discretion to ignore the requirements of notice", or "authority at will to ignore" them (Legislative History, pp. 212, 275).

The decision of the court below would disregard this legislative history and, at least so far as the exception of "willfulness" is concerned,[25] would read it out of the statute. If a statement of charges instituting a formal license-revocation proceeding recites facts from which "the intentional doing of the act charged" may be implied, then, according to the court, the notice provisions of Section 9(b) are by-passed. "Willfulness" has been established, and no prior "opportunity to demonstrate or achieve compliance" is required.

Surely, by this approach the very special *preliminary notice and opportunity* requirements of Section 9(b), meant by their terms and by their declared history to add something to basic due process, are neglected and made futile. If Section 9(b) were not in the law at all, still no statement of charges by an administrator could support disciplinary proceedings unless it recited facts from which knowledge and intent to do the acts charged might be implied. That is a basic requirement of due process in all judicial and quasi-judicial proceedings to punish or to discipline. If

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[25] Appellees in their brief below suggested, without supporting argument, that the case might fall also within the exception dealing with "public * * * interest" (Brief, p. 21). The Commission in its Memorandum Opinion and Order (Jt. App. 27a) made the same suggestion, citing as authority its own recent opinion in *Sterling Securities Co.*, published in Securities Exchange Act Release No. 5527, June 5, 1957. Since the court below did not think enough of the suggestion even to comment on it, much less adopt it, we need not deal with it at any length here. The Commission's view, as expressed in the *Sterling* case, seems to be that, because all its statutes are administered in the "public interest", all its proceedings are exempt from Section 9(b). This assumption of peculiar self-importance is sheer bureaucratic nonsense.

Section 9(b) is to mean anything, as Congress clearly intended it should, its effect cannot be allowed to be defeated by a mere statement of charges in the minimum form sufficient to support an indictment.

Moreover, the cases cited by Judge Keech to support his statement of "the rule applicable to an indictment" (Jt. App. 52a, footnote 22) themselves fail to sustain his conclusion that the statement of charges here would be sufficient under that rule. Thus, in *United States* v. *Renken*, 55 F. Supp. 1 (D. C. S. C. 1944), the rule is stated as follows (p. 3):

> • • • The general rule is that the term "wilful" can not be omitted from the indictment when the term is part of a statutory definition. • • • But where the facts alleged necessarily import willfulness, the failure to use the word *wilful* is not fatal to the indictment • • •.[26]

Applying this rule, the court in the *Renken* case *dismissed* all substantive counts of an indictment charging violations of the Emergency Price Control Act of 1942 by sales of liquor at prices "in excess of the applicable minimum price established" in the regulations, on the ground that there was no sufficient charge of *willful* violation, as required by the Act. This though the doing of specific affirmative acts by the defendants at specific times and places, and the illegality thereof, were clearly charged.

So here. While space limitations preclude detailed analysis of the Commission's specification of charges against appellant, we submit that no reasonable reading of any one of them can justify the conclusion that "the facts alleged necessarily import willfulness". At the most they permit such a deduction by a reader with a mind set

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[26] The rule is similarly stated in *Howenstine* v. *United States*, 263 Fed. 1, 4 (C. A. 9, 1920), the other case cited in footnote 22 to the opinion.

thereto; but that is surely not a sufficient compliance with the rule of the *Renken* case on which Judge Keech relied.[27]

Without attempting to draw a line which would automatically solve all cases, we suggest that at a very minimum in such a case as this the Commission, if it is to sustain its burden of excusing itself from the application of Section 9(b),[28] must in its formal order for hearing either make and recite affirmative findings of the existence of facts which satisfy it, as a responsible administrative agency, that such a degree of willfulness exists as "fully and fairly" to warrant institution of proceedings without prior notice, or at the very least recite in its statement of charges facts from which the only reasonable inference to be drawn is one of willful violation of recognized standards of professional conduct.[29]

---

[27] See pp. 40-42, *infra*, for further discussion.

[28] The principle that one claiming the benefit of an exception to, or exemption from, a statutory policy carries the burden of establishing that he falls within the terms of the provision on which he relies is too well known to need extensive citation of authority. The case most frequently cited is *Spokane & I. E. R. Co.* v. *United States*, 241 U. S. 344, 348, 350 (1916), in which the Court refers to "the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed; that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment." See, also, *Schlemmer* v. *Buffalo, R. & P. R. Co.*, 205 U. S. 1, 10 (1907). While this principle is most commonly applied to members of regulated industries or groups seeking exemption from statutory regulatory policy, we know no reason why it should not apply with equal force to an administrative agency seeking exemption from a statute designed to regulate its own conduct of administrative proceedings.

[29] An illustration which presumably Congress had in mind may be found in Section 304(a) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. § 334(a), prohibiting the institution of multiple condemnation proceedings against misbranded articles unless, *inter alia*, "the Secretary has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Department that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent" etc. While this section does not of itself call for prior notice, it at least imposes on the Secretary an affirmative duty of finding facts bringing himself within the exception before he may avail himself of it.

To support his conclusion that less than this is sufficient, Judge Keech cites two decisions, one from the Seventh Circuit (*Great Western Food Distributors* v. *Brannan*, 201 F. 2d 476, 484 (1953)), and one by this Court (*Air Transport Associates* v. *Civil Aeronautics Board*, 91 App. D. C. 147, 153, 199 F. 2d 181, 186 (1952), cert. den. 344 U. S. 922). As to the latter, we find nothing in this Court's decision to sustain the court below. The case arose on petition for review of a Civil Aeronautics Board order revoking petitioner's operating authority as an air carrier. Prior to institution of the revocation proceeding the Chief of the Office of Enforcement by letter on May 13, 1949, had informed the petitioner "that its operations exceeded the frequency and regularity permissible under its Letter * * * and warned that failure to comply would result in the institution of enforcement proceedings" (199 F. 2d at 183). Thereafter a Regulation was substituted for the Letter of Registration. Petitioner diverted a number of planes, and "said that this represented an attempt to conform to the Regulation". The Court's recital continued:

> In the meantime and thereafter, a long correspondence ensued, which culminated on December 19, 1949, when the Enforcement Office of the Board filed a Motion for Institution of Enforcement Proceedings. * * * The motion charged that the operations in violation were "knowing and wilful". (199 F. 2d at 183.)

After reviewing the merits and sustaining the Board's position, the Court continued (p. 186):

> "Associates' final contention is that its Letter of Registration was improperly revoked, since its violations were not wilful and it had not had notice from the Board or an opportunity to comply.
>
> Associates argues that Section 401(h) of the Civil Aeronautics Act and Section 9(b) of the Administrative Procedure Act required that it have notice from the Board before its Letter could be revoked. The terms of Section 401(h) relate to certificates of convenience and necessity and so have no appli-

> cation here. Section 9(b) of the Administrative Procedure Act provides an exception to the notice requirement in cases of wilfulness. In this respect the warnings from the Enforcement Office to Associates are relevant and, together with the replies thereto, establish the wilfulness of these violations. (Footnotes omitted.)

It would thus appear not only that the petition of the responsible administrator recited the occurrence of "knowing and wilful" violations as a basis for institution of the proceedings, but also that the petitioner was given full notice of and an opportunity to dispute the Board's views as to the legality of its conduct before the proceeding was instituted. Manifestly the Civil Aeronautics Board made a full and fair, and successful, effort to comply with Section 9(b) and to establish its right to rely on the exception. No such comment can be made regarding the Commission in the instant case.

The other decision cited by Judge Keech, *Great Western Food Distributors* v. *Brannan*, *supra*, is concededly less easily disposed of. There the court sustained, on petition for review, an order of the Department of Agriculture suspending petitioners' trading privileges on contract markets on the basis of a finding that they had manipulated and cornered the egg market in violation of the Commodity Exchange Act. Having decided that the evidence was adequate to establish cornering, the court concluded:

> • • • All that remained to be proved to sustain the complaint was that this program was intentionally undertaken.
>
> Government witness Seitz' testimony and official report amply provided such proof. • • •
>
> Petitioners assert that the order of the Judicial Officer was violative of Section 9(b) of the Administrative Procedure Act, 5 U. S. C. A. § 1008. • • • It is said that the order must be set aside because petitioners were not notified in writing of the charges being contemplated against them. Assuming, arguendo, that this section is applicable to proceedings

> such as this, in view of the evidence that petitioners wilfully violated the act, i.e., that they intentionally set out to widen the spread between December and January futures, its relevance is, by its own terms, excluded in this instance. (Pp. 483-484.)

We cannot say with confidence that the court was wrong in concluding, when the evidence was all in and the issue of willfulness had been determined against petitioners, that Section 9(b) of the Administrative Procedure Act could no longer be availed of by petitioners to invalidate the proceeding *ab initio*. In effect, it was too late; it would have been futile for the court, knowing that the Secretary, because he had shown that he could, would be able to prove willfulness in a new hearing, to reverse the order and require him to start the proceeding all over again after giving notice of the facts which he expected to, and knew he could, prove.

Here, however, we face the question at the initial stage, when no one knows whether the appellees can prove "willfulness", or even whether or if so why they think they can. At this stage appellees have the burden of bringing themselves within the exception which would entitle them to proceed formally against appellant without first meeting the prior "notice and opportunity" provisions of Section 9(b). They have not done so. Their argument, and that of the court below, seems to be that if on the final showdown willfulness shall have been established, then the institution of the proceeding without prior notice will have been proper. To the extent that the *Great Western Food Distributors* decision supports this argument, we think it plainly wrong. It would read Section 9(b) out of the statute just as effectively as would Judge Keech's view (discussed above, pp. 24-29) that the formal notice instituting the proceeding satisfies the prior "notice and opportunity" requirement of the section. It would mean that the only way a licensee could establish his right to preliminary notice would be to complete and win the revocation

proceeding. Then, when it would no longer do him any good, it would be clear that he should have had prior notice before the proceeding was instituted. He could, ruefully, compare himself to the suspected witch required to prove her non-witchhood by drowning.

Finally, on this branch of the case, we would question seriously Judge Keech's characterization of the particular charges which form the basis of appellee's "Notice and Order" instituting its disciplinary proceeding against appellant. For instance (Jt. App. 51a-52a) "the court concludes that, at the very least, charge '9' falls within the class of cases involving 'willfulness', which are excepted from the notice requirement."

This charge, which Judge Keech quotes in a footnote to the cited passage from his opinion, reads as follows:

> 9. Respondent testified on November 29, 1956, in Commission proceedings In the Matter of Great Sweet Grass and Kroy under Section 19(a)(2) of the Exchange Act that he never heard of Eurobrasil Trust and that he had no dealings with, or transactions with anybody connected with, Eurobrasil Trust. The record in the aforesaid proceedings reflects that on April 12, 1956 respondent placed an order with a member firm of the Exchange for the purchase of 20,000 shares of Great Sweet Grass stock, which order was for the account of Eurobrasil Trust.

This charge, according to Judge Keech, "involves" willfulness because "knowledge and intent are implicit in the facts stated." But are they?

The charge, stripped down, is that appellant testified that "he never heard of Eurobrasil Trust and that he had no dealings with, or transactions with anybody connected with, Eurobrasil", and that, on the other hand, the record in the *Great Sweet Grass* proceeding before the Commission "reflects" that on a given date appellant placed an order for a purchase of Great Sweet Grass stock "for the account of Eurobrasil Trust."

It is thus charged, rather loosely ("the record • • • reflects"), that appellant had had dealings with an entity which he testified he had never heard of or dealt with. But it is not charged that he had any knowledge that his dealings were with that entity, or that he had *intentionally* done any act inconsistent with his testimony before the Commission. The Commission did not so charge, and not having done so it cannot claim the benefit of the "willfulness" exception, even as construed by Judge Keech. Even Judge Keech's minimum requisite of "knowledge and intent" is absent. But more important, the Commission did not so charge, and as a responsible administrative agency could not have done so. The record before the Commission contains no evidence whatsoever that appellant ever knew that the order he placed was for the account of Eurobrasil Trust, and shows affirmatively that in placing it he explained that he did not know for whose account it was placed, and that the person with whom it was placed testified that he learned the identity of the buying principal from someone else, not from appellant (see affidavit of Chester T. Lane dated July 25, 1957, filed in the court below and not answered by appellees, Jt. App. 38a-43a). Moreover, as Mr. Lane's affidavit further shows, as soon as appellant heard of the testimony in question, he notified the Commission that he had transmitted the order at the request of another, and had never learned for whose account it had been placed. With this record before the Commission it could scarcely have dared, as a responsible administrative body, to charge appellant with wilfully making a false statement in proceedings before it.

Similarly with Judge Keech's statement that "the facts alleged in many of [the other eight charges] import an intentional act of omission or commission" (Opinion, Jt. App. 52a). As again shown by Mr. Lane's uncontested affidavit (Jt. App. 38a-43a), these charges import a belief by the Commission that legal opinions rendered by appellant's firm to his clients, and activities (or inactivities) by his firm on his clients' behalf, were inconsistent with legal principles and standards of professional conduct not gen-

erally understood or accepted by the bar and first announced by the Commission after the fact, in its later opinion in the *Great Sweet Grass* delisting proceeding and, by implication, in its Notice and Order directed to appellant.

If ever a case could demonstrate the wisdom of Congress's insistence on the "prior notice and opportunity" protection written into the law by Section 9(b) of the Administrative Procedure Act, this case is it.

III

The court below properly accepted jurisdiction of this action.

The court below accepted appellant's contention that in the circumstances of this case recourse could properly be had to the courts for relief and for determination of "the purely legal question of the Commission's authority to maintain the pending disciplinary proceedings against plaintiff" (Opinion, Jt. App. 50a), without first completing the proceeding before the Commission.

We believe that in this respect the action of the court below was clearly correct, for the reasons stated in its opinion. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), so frequently relied on to justify foreclosing premature judicial interference with administrative proceedings, has no application where the issue of the propriety of the administrative proceedings depends solely on a question of law, the determination of which cannot be affected by facts which may be adduced at the administrative hearing. We believe that this is made clear by the much more recent decision of the Supreme Court in *Allen* v. *Grand Cent. Aircraft Co.*, 347 U. S. 535 (1954). That case involved an action to enjoin administrative proceedings to determine the existence of violations of the Wage Stabilization provisions of the Defense Production Act of 1950. An injunction was granted by a three-judge district court, and its judgment appealed directly to the Supreme

Court. Though disagreeing with the lower court on the legal issue of the Government's right to hold the hearing, the Supreme Court upheld the lower court's acceptance of jurisdiction to determine that legal issue.

> • • • Appellee argues that such proceedings carry the possibility of the disallowance as a business expense, for income-tax purposes, of $750,000, more or less, up to the total wages paid, exceeding $5,500,000. Appellee contends also that the mere threat of such action would jeopardize the bank credit upon which it depends for essential working capital. There is grave doubt of the right of appellee thus to test the validity of administrative procedure before exhausting it or bringing the issues closer to a focus than it has done. However, it is clear that *once the right of the Government to hold administrative hearings is established, a litigant cannot enjoin them* merely because they might jeopardize his bank credit or otherwise be inconvenient or embarrassing. Aircraft & Diesel Corp. v. Hirsch, 331 U. S. 752, 777-779. "[T]he expense and annoyance of litigation is 'part of the social burden of living under government.'" Petroleum Exploration, Inc. v. Public Service Commission, 304 U. S. 209, 222. See also Myers v. Bethlehem Corp., 303 U. S. 41, 47; • • •.
>
> It is appellee's principal claim that there is *no properly authorized administrative procedure for it to exhaust and that the administrative authorities who seek to determine its case have no lawful right to do so. We, therefore, go directly to the heart of this controversy*, which is the question whether the administrative enforcement of the 1950 wage stabilization program has been validly authorized. (Pp. 540-1; emphasis supplied.)

Since we agree with the decision of the court below on the issue of its jurisdiction to entertain this action, we consider it appropriate to postpone further argument on this issue until we have had an opportunity to examine such countervailing authorities as appellees may put forward in their brief.

Conclusion

We have advanced above reasons amply sufficient, in our judgment, to require that the Order and Judgment of the court below granting appellees' motion be reversed and the complaint be reinstated.

It may be that in also denying appellant's motion for a preliminary injunction the court below did so automatically, as a necessary consequence of the dismissal of the complaint and without independent consideration of the motion's merits. However, that does not mean, we submit, that if this Court should reverse the judgment below in so far as it dismissed the complaint the case should then be returned to the District Court without consideration by this Court of appellant's motion. Whatever might bear on the granting or denial of appellant's motion is as manifest on the record in this Court as it was in the court below; and there are no matters of fact but only questions of law at issue.

Accordingly, we urge that if the Court should reverse the dismissal of the complaint it should also consider and either grant appellant's motion for a preliminary injunction, or remand the case with directions that it be granted.

Respectfully submitted,

CHESTER T. LANE,
150 Broadway,
New York 38, N. Y.,
Counsel for Appellant.

September, 1957.

BEER, RICHARDS, LANE, HALLER & BUTTENWIESER,
150 Broadway,
New York 38, N. Y.;

FOWLER, LEVA, HAWES & SYMINGTON,
1701 K Street, Northwest,
Washington 6, D. C.,
of Counsel.

APPENDIX

Statutes

Administrative Procedure Act

60 Stat. 236, 5 U. S. C. Sec. 1001

Sec. 2. As used in this Act—

• • •

(e) *License and licensing.*—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

• • •

Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) *Rules.*—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in

accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

• • •

Sec. 6. Except as otherwise provided in this Act—

• • •

(b) *Investigations.*—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

• • •

Sec. 9. In the exercise of any power or authority—

• • •

(b) *Licenses.*—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements.

• • •

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and venue of action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency othewise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * *

Securities Exchange Act of 1934, as Amended
48 Stat. 881, 15 U. S. C. Sec. 78

Sec. 23. (a) The Commission and the Board of Governors of the Federal Reserve System shall each have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this title, and may for such purpose classify issuers, securities, exchanges, and other persons or matters within their respective jurisdictions. * * * [20]

Regulations

Rule II of the Commission's Rules of Practice appears as Exhibit B to the complaint, Jt. App. 14a-15a.

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[20] Comparable provisions appear in each of the other statutes administered by the Commission.

United States Court of Appeals

For the District of Columbia Circuit

No. 14103

MORRIS MAC SCHWEBEL,

Appellant,

vs.

ANDREW D. ORRICK, HAROLD C. PATTERSON, EARL F. HASTINGS, JAMES C. SARGENT,

Appellees.

Appeal from an Order and Judgment of the United States District Court for the District of Columbia

JOINT APPENDIX

Complaint for Injunction and Declaratory Judgment

Filed
Jun 24 1957
Harry M. Hull, Clerk

[1] UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Civil No. 1510-57

MORRIS MAC SCHWEBEL, 2 Leith Place, White Plains, New York,

Plaintiff,

against

ANDREW D. ORRICK, HAROLD C. PATTERSON, EARL F. HASTINGS, JAMES C. SARGENT,

Defendants.

---

1. This is a civil action for an injunction and a declaratory judgment. The action arises under the Administrative Procedure Act, Act of June 11, 1946, c. 324. Sections 3(a), 6(b) and 9(b), 60 Stat. 238, 5 U. S. C., §§ 1002(a), 1005(b) and 1008(b), and the "due process" clause of the Fifth Amendment to the Constitution of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars. This Court has jurisdiction of this action by virtue of 28 U. S. C. §§ 1331 and 2201, and Section 10 of the Administrative Procedure Act, 5 U. S. C. § 1009.

2. Plaintiff is a citizen of the State of New York and a member in good standing of the bar of the highest court of the State of New York.

3. Each of the defendants is a member of the Securities and Exchange Commission, an agency of the United

States Government created by Act of June 6, 1934, c. 404, § 4, 48 Stat. 885, 15 U. S. C. § 78(d), and each of said defendants is found in the District of Columbia.

[2] 4. On May 6, 1957, defendants caused to be issued and served upon plaintiff a "Notice of and Order for Private Hearing Pursuant to Rule II (e) of the Rules of Practice", a copy of which is hereto attached as Exhibit A, directing that a private hearing be commenced on June 10, 1957 (which date was by supplemental order of the defendants adjourned to June 24, 1957) for the purpose of taking evidence on the matters set forth in Paragraph II of the said Notice of and Order for Private Hearing at the offices of the Securities and Exchange Commission, 425 Second Street, N. W., Washington, D. C., to determine whether plaintiff herein should temporarily or permanently be disqualified from and denied the privilege of appearing or practicing before the said Commission pursuant to Rule II(e) of the said Commission's Rules of Practice. A copy of said Rule II(e) is attached hereto as Exhibit B.

5. Said Notice of and Order for Private Hearing further provided that plaintiff herein file his answer to the matters specified in Paragraph II thereof with the said Commission on or before June 3, 1957 (which date was by supplemental order of the defendants adjourned to June 10, 1957). No such answer has as yet been filed by plaintiff herein.

6. On June 10, 1957, plaintiff herein filed with the said Commission a Motion to Dismiss the aforesaid disciplinary proceeding initiated by the said Notice of and Order for Private Hearing on the ground that the said Commission had no jurisdiction to institute such a proceeding. A copy of said Motion is attached hereto as Exhibit C.

[3] 7. At no time prior to the institution of the aforesaid proceeding to suspend or revoke plaintiff's permission

to appear or practice before the said Commission did the Commission call to plaintiff's attention in writing facts or conduct which in its judgment might warrant such action, as required by Section 9(b) of the Administrative Procedure Act, 5 U. S. C. § 1008(b).

8. On June 17, 1957, plaintiff herein filed with the said Commission a Supplemental Motion to Dismiss the aforesaid disciplinary proceeding on the additional ground that said Notice of and Order for Private Hearing was invalid by reason of a failure of compliance with said Section 9(b) of the Administrative Procedure Act. A copy of said Supplemental Motion to Dismiss is attached hereto as Exhibit D.

9. On June 20, 1957, defendants caused to be issued an Opinion and "Order Denying Motions to Dismiss", copy of which is attached as Exhibit E. Said Order further extended plaintiff's time to file his answer in the aforesaid disciplinary proceeding to July 1, 1957, and adjourned the date for the commencement of the hearing therein to July 8, 1957.

10. Defendants' said Notice of and Order for Private Hearing and defendants' said Order denying Motions to Dismiss constitute agency actions as defined in Section 2(g) of the Administrative Procedure Act, 5 U. S. C. §1001(g), which are final within the meaning of Section 10(c) of said Act, and which are in violation of Sections 3(a), 6(b) and 9(b) of said Act and the "due process" clause of the Fifth Amendment to the Constitution of the United States, and for which plaintiff has no adequate remedy other than the remedy sought in this [4] action.

11. Defendants have no statutory power or authority to adjudicate and enforce disciplinary action against plaintiff.

12. In the event that defendants have statutory power to prescribe by rule for the admission of and disciplinary measures against attorneys practicing before them, defendants have failed to exercise that power by failing to prescribe any rule establishing any standards for the admission or enrollment of attorneys authorized to practice before them.

13. Rule II(e) of defendants' Rules of Practice, a copy of which is hereto attached as Exhibit B, is an invalid exercise of defendants' statutory power, if any, to prescribe by rule for disciplinary measures against attorneys practicing before them.

14. In the event that defendants have statutory power to adjudicate and enforce disciplinary action against plaintiff, the purported exercise thereof by issuance of said Notice of and Order for Private Hearing is illegal and invalid, by virtue of defendants' failure to comply with the provisions of Section 9(b) of the Administrative Procedure Act, 5 U. S. C. § 1008(b).

15. Defendants by their said Notice of and Order for Private Hearing and their said Order Denying Motions to Dismiss have threatened and continue to threaten, to subject plaintiff to adjudicative procedure prescribed by defendants in violation of law.

16. Unless the relief requested herein is granted, plaintiff will be required to assume the burden [5] and expense of defending at his peril his professional reputation in an extensive and complicated proceeding instituted by defendants in violation of law.

17. Defendants have subjected and threaten to continue to subject plaintiff to great and irreparable injury and unless this Court grants the relief requested herein plain-

tiff will continue to suffer great and irreparable injury by being required to defend the pending disciplinary proceeding unlawfully initiated against him by the defendants herein.

WHEREFORE, plaintiff demands:

1. That defendants and each f them, their agents and employees, and all others acting under their direction, be enjoined at first during the pendency of this action, and thereafter permanently from

(a) further prosecuting the disciplinary proceeding now pending against plaintiff entitled "In the Matter of Morris Mac Schwebel, Rule II(e), Rules of Practice—File No. 4-89";

(b) prosecuting any other disciplinary proceeding against plaintiff pursuant to any rules or regulations not authorized by law;

(c) continuing in effect defendants' said "Notice of and Order for Private Hearing Pursuant to Rule II(e) of the Rules of Practice", dated May 6, 1957.

2. That defendants and each of them be ordered to vacate the said "Notice of and Order for Private Hearing Pursuant to Rule II(e) of the Rules of Practice" dated May 6, 1957, in the proceeding now pending before them entitled "In the Matter of Morris Mac Schwebel, Rule II(e), Rules of Practice—File No. 4-89".

[6] 3. That this Court declare, adjudge and decree

(a) that defendants are without authority in law to adjudicate and enforce disciplinary proceedings of any nature whatsoever against plaintiff arising out of the matters set forth in Paragraph II of the said "Notice of

and Order for Private Hearing Pursuant to Rule II (e) of the Rules of Practice" dated May 6, 1957,

(b) that Rule II (e) of defendants' Rules of Practice is invalid and not authorized by law,

(c) that defendants' said "Notice of and Order for Private Hearing Pursuant to Rule II (e) of the Rules of Practice" dated May 6, 1957 and defendants' said "Order Denying Motions to Dismiss" constitute final agency action within the meaning of Section 10(c) of the Administrative Procedure Act, in violation of Sections 3 (a), 6 (b) and 9 (b) of said Act.

4. That the Court grant to plaintiff such other and further relief as may be necessary in the premises.

ALEXANDER B. HAWES
1701 K Street Building,
Washington 6,
District of Columbia.

CHESTER T. LANE
150 Broadway,
New York 38, New York.

Attorneys for Plaintiff.

FOWLER, LEVA, HAWES & SYMINGTON,
1701 K Street Building,
Washington 6, District of Columbia,
of Counsel.

BEER, RICHARDS, LANE, HALLER & BUTTENWIESER,
150 Broadway,
New York 38, New York,
of Counsel.

Dated: June 21, 1957.

[7] STATE OF NEW YORK
CITY OF NEW YORK
COUNTY OF NEW YORK } ss.:

MORRIS MAC SCHWEBEL, being first duly sworn, upon oath deposes and says:

I am the plaintiff named in the foregoing complaint. I have read the foregoing complaint and verily believe the facts stated therein to be true.

MORRIS MAC SCHWEBEL.

Subscribed and sworn to before me
this 21st day of June, 1957.

ROSE S. COHL,
Notary Public.

ROSE S. COHL
Notary Public, State of New York
(Seal) No. 31-0694315
Qualified in New York County
Commission Expires March 30, 1959

Exhibit A

Filed
Jun 24 1957
HARRY M. HULL, Clerk

[8] UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

NOTICE OF AND ORDER FOR PRIVATE HEARING PURSUANT TO RULE II(E) OF THE RULES OF PRACTICE

In the Matter

of

MORRIS MAC SCHWEBEL

Rule II(e), Rules of Practice

File No. 4-89

I.

Morris Mac Schwebel ("respondent"), 30 Broad Street, New York City, New York, is an attorney practicing before the Commission within the meaning of Rule II(g) of the Rules of Practice of the Commission. At all the times hereinafter mentioned respondent acted as American counsel for Great Sweet Grass Oils Limited ("Great Sweet Grass"), an Ontario corporation, and Kroy Oils Limited ("Kroy"), an Alberta corporation.

Exhibit A

II.

The Commission has reason to believe that respondent has engaged in unethical and improper professional conduct within the meaning of Rule II(e) of the Commission's Rules of Practice in the following regards:

1. **The Commission advised respondent by letter dated March 8, 1956 that the current report on Form 8-K for the month of December, 1955 filed by Great Sweet Grass pursuant to Section 13 of the Securities Exchange Act of 1934 ("the Exchange Act") was deficient in respects enumerated therein and requested, among other things, that the Commission be furnished with certain specified supporting data to the end of 1955 relating to the oil reserve report prepared by John Campbell Sproule ("Sproule"), a consulting geologist of Alberta, Canada, which report was included as an exhibit to the Form 8-K report. Notwithstanding the foregoing request respondent instructed Sproule to prepare the information requested by the Commission as to the date of Sproule's original report, rather than to the end of 1955.**

2. Sproule advised respondent, by letter dated April 13, 1956, that Sproule's original report was not authorized to be filed with the Commission, was not the type of report acceptable to the Commission, and was out of date and inaccurate in light of subsequent developments. Respondent failed and neglected to bring these matters to the attention of the Commission.

3. The Commission informed respondent by letter dated July 20, 1956 that the information in Item 2 of the current report on Form 8-K filed by Kroy Oils Limited ("Kroy") for the month of May, 1956 pursuant to Section

13 of the Exchange Act was considered misleading with respect to estimated oil reserves and requested certain specified information be furnished to the Commission with respect to such reserves. Respondent failed and neglected to [9] attempt to secure the information requested by the Commission.

4. In August, 1955 respondent, without making adequate inquiry as to the facts, furnished a legal opinion as to the American Stock Exchange ("the Exchange") stating that the issuance and sale of 500,000 shares of capital stock $1 par value of Great Sweet Grass to Torny Financial Corporation ("Torny"), a Canadian underwriting company, were not required to be registered under the Securities Act of 1933 ("the Securities Act"), on the ground that such shares were not to be distributed in the United States. Said opinion furnished the basis for the claim to an exemption from registration of such shares under the Securities Act contained in the Form 8-K report filed with the Commission in September, 1955. Thereafter, respondent learned or should have learned that Torny resold such shares for distribution in the United States but respondent failed to make any inquiry as to whether such circumstances required a revision of his opinion to the Exchange or the claim to exemption made in the Form 8-K report.

5. Despite respondent's relationship to Great Sweet Grass and to Arthur M. Krensky & Co. Inc., a member firm of the Exchange specializing in the stock of Great Sweet Grass, respondent in September, October and November, 1955 made arrangements for his client, M. J. Shuck & Company ("Shuck"), to purchase in excess of 500,000 shares of common stock of Great Sweet Grass for sale in the over-the-counter market without sufficient inquiry as

to the source of such shares to be able to determine whether or not such shares should be registered under the Securities Act. Respondent received a finder's fee of $5,000 from one of the sellers of such shares to Shuck.

6. In January and February, 1956, another client of respondent, Murray Securities Corporation ("Murray"), informed respondent it had received 200,000 shares of common stock of Great Sweet Grass for sale in the over-the-counter market, 100,000 of which shares were acquired from minority stockholders of an Alberta corporation and the other 100,000 shares were acquired from minority stockholders of an Oklahoma corporation. Respondent was requested by Murray to furnish a legal opinion as to the legality of the sale of such shares without registration under the Securities Act. Respondent failed and neglected to make proper and sufficient investigation as to the facts and circumstances surrounding the sale of the aforesaid 200,000 shares of stock of Great Sweet Grass to warrant rendering an opinion that such shares were not required to be registered under the Securities Act.

7. In December, 1955 respondent without making adequate inquiry as to the facts, furnished a legal opinion to the Exchange stating that the issuance and sale of 500,000 shares of capital stock $1 par value of Great Sweet Grass to Pitt Petroleum Limited ("Pitt"), an Alberta corporation, were not required to be registered under the Securities Act of 1933 by virtue of Rule 133 thereunder. Said opinion furnished the basis for the claim to an exemption from registration of such shares under the Securities Act contained in the Form 8-K report filed with the Commission in January, 1956. Thereafter, respondent learned or [10] should have learned that such shares were being resold to the public by his client, Murray, and others in the United

States but respondent failed to make sufficient inquiry as to whether such circumstances required a revision of his opinion to the Exchange or the claim to exemption made in the Form 8-K report.

8. In December, 1955 respondent without making adequate inquiry as to the facts, furnished a legal opinion to the Exchange stating that the issuance and sale of 1,750,000 shares of capital stock $1 par value of Great Sweet Grass to Depositors Mutual Oil Development Company, an Oklahoma corporation, were not required to be registered under the Securities Act by virtue of Rule 133 thereunder. Said opinion furnished the basis for the claim to an exemption from registration of such shares under the Securities Act contained in the Form 8-K report filed with the Commission in January, 1956. Thereafter, respondent learned or should have learned that such shares were resold in the United States but respondent failed to make sufficient inquiry as to whether such circumstances required a revision of his opinion to the Exchange or the claim to exemption made in the Form 8-K report.

9. Respondent testified on November 29, 1956, in Commission proceedings In the Matter of Great Sweet Grass and Kroy under Section 19(a)(2) of the Exchange Act that he never heard of Eurobrasil Trust and that he had no dealings with, or transactions with anybody connected with, Eurobrasil Trust. The record in the aforesaid proceedings reflects that on April 12, 1956 respondent placed an order with a member firm of the Exchange for the purchase of 20,000 shares of Great Sweet Grass stock, which order was for the account of Eurobrasil Trust.

Exhibit A

III.

WHEREFORE NOTICE IS HEREBY GIVEN AND IT IS HEREBY ORDERED that a private hearing be held for the purpose of taking evidence on the matters set forth in Paragraph II on June 10, 1957 at 10:00 A. M., E. D. S. T., at the offices of the Securities and Exchange Commission, 425 Second Street, N.W., Washington 25, D. C., to determine whether respondent should temporarily or permanently be disqualified from and denied the privilege of appearing or practising before the Commission pursuant to Rule II(e) of the Commission's Rules of Practice.

IT IS FURTHER ORDERED that respondent shall file with the Secretary of the Commission his answer to the matters specified in Paragraph II hereof on or before June 3, 1957.

IT IS FURTHER ORDERED that William W. Swift or any other officer or officers of the Commission designated by [11] it for the purpose shall preside at such hearing. The officer so designated is hereby authorized to exercise all powers and perform the duties specified in the Rules of Practice of the Commission and any other duties which he may be authorized to perform in accordance with law.

By the Commission

(Signed) ORVAL L. DUBOIS (Seal)
Orval L. DuBois
Secretary

Exhibit B

Filed
Jun 24 1957
HARRY M. HULL, Clerk

[12] SECURITIES AND EXCHANGE COMMISSION

RULES OF PRACTICE

RULE II.

APPEARANCE AND PRACTICE BEFORE THE COMMISSION.—(a) An individual may appear in his own behalf, a member of a partnership may represent the partnership, a bona fide officer of a corporation, trust or association may represent the corporation, trust or association, and an officer or employee of a State commission or of a department or political subdivision of a State may represent the State commission or the department or political subdivision of the State, in any proceeding.

(b) A person may be represented in any proceeding by an attorney at law admitted to practice before the Supreme Court of the United States, or the highest court of any State or Territory of the United States, or the Court of Appeals or the District Court of the United States for the District of Columbia.

(c) A person shall not be represented at any hearing before the Commission or a hearing officer except as stated in paragraphs (a) and (b) of this rule.

(d) Any person appearing before or transacting business with the Commission in a representative capacity may be required to file a power of attorney with the Commission showing his authority to act in such capacity.

Exhibit B

(e) The Commission may disquality, and deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after hearing in the matter

(1) not to possess the requisite qualifications to represent others; or

(2) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct.

(f) Contemptuous conduct at any hearing before the Commission or a hearing officer shall be ground for exclusion from said hearing and for summary suspension without a hearing for the duration of the hearing.

(g) For the purposes of this rule, practicing before the Commission shall include the preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other expert, filed with the Commission in any registration statement, application, report or other document with the consent of such attorney, accountant, engineer or other expert.

Exhibit C

Filed
Jun 24 1957
Harry M. Full, Clerk

[13] UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

In the Matter of

MORRIS MAC SCHWEBEL

Rule II(e), Rules of Practice

File No. 4-89

MOTION TO DISMISS

M. Mac Schwebel, the respondent herein, moves the Securities and Exchange Commission to dismiss this proceeding on the ground that the Commission is without jurisdiction to take the action proposed in Paragraph III of the "Notice of and Order for Private Hearing Pursuant to Rule II(e) of the Rules of Practice" issued by the Commission herein on May 6, 1957.

Respondent further moves the Commission that if the Commission shall deny the foregoing motion, or shall postpone its disposition until the hearing on the merits, the time for the service of respondent's answer herein shall

be extended to and including the tenth day after notice to the respondent of the Commission's action.

Dated: June 7, 1957.

CHESTER T. LANE,
Attorney for Respondent,
150 Broadway,
New York 38, New York.

Exhibit D

Filed
Jun 24 1957
Harry M. Hull, Clerk

[14] UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

In the Matter of

MORRIS MAC SCHWEBEL

Rule II(e), Rules of Practice

File No. 4-89

SUPPLEMENTAL MOTION TO DISMISS

Supplementing the motion to dismiss this proceeding filed herein by the respondent, M. Mac Schwebel, on June 10, 1957, the respondent further moves to dismiss the proceeding on the ground that the same has been instituted in violation of Section 9(b) of the Administrative Procedure Act, 5 U. S. C. § 1008(b).

Dated: June 14, 1957.

CHESTER T. LANE,
Attorney for Respondent.
150 Broadway,
New York 38, New York.

Exhibit E

Filed
Jun 24 1957
Harry M. Hull, Clerk

[15] UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

Jun 20 1957

In the Matter of

MORRIS MAC SCHWEBEL

(File No. 4-89)

(Rule II(e)—Rules of Practice)

MEMORANDUM OPINION AND ORDER
DENYING MOTIONS TO DISMISS

PRACTICE AND PROCEDURE

Suspension of Privilege to Practice Before Commission

Motion to Dismiss

Rules Regulating Practice Before Commission

Section 9(b) of Administrative Procedure Act

Motions to dismiss proceeding under Rule II(e) of the Commission's Rules of Practice to determine whether to

suspend attorney's privilege of practice before the Commission on grounds of lack of jurisdiction and for failure to accord opportunity pursuant to Section 9(b) of the Administrative Procedure Act to achieve compliance with legal requirements prior to institution of proceeding, *denied*, such proceedings being authorized by Commission's Rule II of its Rules of Practice issued pursuant to express authority in statutes administered by Commission to hold hearings and issue such rules and regulations as are necessary or appropriate therefor; and such proceeding not being subject to the Administrative Procedure Act, and in any event being within exceptions expressly provided in Section 9(b) thereof for cases of willfulness and those in which the public interest requires otherwise.

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[16] Appearances:

CHESTER T. LANE, for respondent Morris Mac Schwebel.

JOSEPH B. LEVIN and JULE B. GREENE, for the Office of the General Counsel.

This is a private proceeding instituted under Rule II(e) of our Rules of Practice (the "Rules") to determine whether the privilege of appearing or practicing before us should be denied temporarily or permanently to Morris Mac Schwebel ("respondent"), an attorney practicing before the Commission within the meaning of Rule II(g)

Exhibit E

of the Rules.[1] We instituted [17] the proceeding on May 6, 1957, and ordered that a hearing be held on June 10, 1957, and that the respondent file his answer to the matters which were specified in the notice of hearing by June 3, 1957. On the request of counsel for respondent, we postponed the date for the filing of the answer to June 10, 1957, and the date of the hearing to June 24, 1957.

On June 10, 1957, respondent filed a motion to dismiss the proceeding on the ground we are without jurisdiction to deny respondent the privilege of practicing before us. In a memorandum filed in support of this motion, respondent asserts that although our rule-making power is sufficiently broad to authorize us to establish a bar of attorneys and to disbar therefrom for good cause shown, we have not implemented our statutory authority by appropriate rules. Respondent urges that the power to disbar is dependent on the exercise of a power to establish a bar, that we have not by Rule II(e) or otherwise established

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[1] Rule II(e) provides:

"The Commission may disqualify, and deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after hearing in the matter

"(1) not to possess the requisite qualifications to represent others; or

"(2) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct."

Rule II(g) provides:

"For the purposes of this rule, practicing before the Commission shall include the preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other expert, filed with the Commission in any registration statement, application, report or other document with the consent of such attorney, accountant, engineer or other expert."

a bar, and that we therefore cannot suspend persons for misconduct. Respondent also urges that public policy requires that we dismiss this proceeding and refer the matters raised to the grievance committee of the applicable bar association.

Respondent on June 17, 1957, filed a supplemental motion to dismiss, on the ground that this proceeding has [18] been instituted in violation of Section 9(b) of the Administrative Procedure Act of 1946 ("Procedure Act").[1]

Memoranda in opposition to the motions were filed by the Office of the General Counsel ("staff"). The staff contends that we have the power to make rules respecting practice before us, and that Rule II of our Rules provides a comprehensive and valid pattern of regulation in that regard. The staff further contends that the Procedure Act does not apply to a disciplinary proceeding such as is here involved and that in any event Section 9(b) of that Act would except the instant case because of the elements of willfulness and public interest which are presented.

Jurisdiction of the Commission

Under each of the statutes administered by this Commission, we are expressly authorized to hold hearings and to adopt such rules and regulations as may be necessary

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[1] Section 9(b) of the Procedure Act provides in pertinent part that:

"Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

or [19] appropriate to carry out the provisions of such statutes.[1] The courts have held, and respondent concedes, that administrative agencies operating under similar statutory provisions have statutory power to adopt rules governing the admission and exclusion of attorneys practicing before them. The Supreme Court in rejecting a contention that there must be specific statutory provision for such power, stated:

> "Our view, on the contrary, is that so necessary is the power and so usual is it that the general words by which the Board is vested with the authority to prescribe the procedure in accordance with which its business shall be conducted include as part of the procedure rules of practice for the admission of attorneys."[2]

The question presented is whether we have implemented our statutory authority by issuing a rule governing the admission of attorneys to practice before us. It is [20]

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[1] Section 19(a), Securities Act of 1933; Section 23(a), Securities Exchange Act of 1934; Section 20(a), Public Utility Holding Company Act of 1935; Section 319(a), Trust Indenture Act of 1939; Section 38(a), Investment Company Act of 1940; and Section 211(a), Investment Advisers Act of 1940.

[2] *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 122 (1926). See also *Herman* v. *Dulles*, 205 F. 2d 715, 716 (C. A. D. C., 1953), where the court, in sustaining the revocation of an attorney's privilege to appear before the International Claims Commission of the Department of State, stated:

> "An administrative agency that has general authority to prescribe its rules of procedure may set standards for determining who may practice before it. Goldsmith v. U. S. Board of Tax Appeals, 270 U. S. 117, 122, 46 S. Ct. 215, 70 L. Ed. 494. The International Claims Commission has express authority to 'prescribe such rules and regulations as may be necessary to enable it to carry out its functions'."

obvious that Rule II(e) provides for the exclusion of certain attorneys. The power to discipline is related to and based upon our unquestioned power to regulate those who are permitted to practice before us. And this we have effectively undertaken to do in Rule II, which contains detailed provisions providing standards for the admission and discipline of attorneys who practice before us.[1]

Respondent's contention that the Rule fails to set up a bar does not give proper recognition to Rule II(b) which clearly prescribes the qualifications to be met by attorneys in order to practice before us,[2] and is apparently based on the fact that the Rules do not now require the filing of affidavits or statements of qualifications or provide for the enrollment or the maintenance of a roster of qualified [21] attorneys.[1] While at one time the Rules of this Com-

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[1] In the case of *Camp* v. *Herzog*, 104 F. Supp. 134 (D. C., 1952), cited by respondent, the Court clearly suggests that it would not have set aside agency action excluding an attorney if the agency had had a rule comparable to our Rule II(e).

[2] Rule II(b) provides:

> "A person may be represented in any proceeding by an attorney at law admitted to practice before the Supreme Court of the United States, or the highest court of any State or Territory of the United States, or the Court of Appeals or the District Court of the United States for the District of Columbia."

Rule II(d) provides that any person appearing before us in a representative capacity may be required to file a power of attorney showing his authority to act.

[1] Rule II(b) is in substance the same as the rules of the Board of Tax Appeals and of the International Claims Commission upheld by the Supreme Court and the Court of Appeals for the District of Columbia, except that under those rules attorneys were required to file affidavits regarding their qualifications. *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 119 (1926); *Herman* v. *Dulles*, 205 F. 2d 715 (C. A. D. C., 1953), 15 F. R. 8676, section 300.4(b).

mission provided for formal admission to practice and the maintenance of a register of attorneys admitted to practice,[2] we consider that provisions for the filing of affidavits or the maintenance of a roster are merely procedural formalities which we have dispensed with in our discretion and their absence does not impair the validity of the Rule.[3]

[22] We are of the opinion that Rule II has properly implemented our admitted statutory power to regulate those who are permitted to practice before us. It regulates the admission of attorneys permitted to practice before us, and as a corollary to such regulation it specifically provides for disciplinary action such as is involved in this proceeding against respondent. Accordingly we conclude

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[2] See Fourth Annual Report of the S. E. C. (1939), page 92.

[3] Compare the following statement from *Standards of Admission for Practice Before Federal Administrative Agencies*, sponsored by the Survey of the Legal Profession, under the auspices of the American Bar Association (1953), page 22:

> "Thirteen [Federal] agencies * * * require lawyers to file applications for admission. With the others, a notice of appearance or a power of attorney filed in a particular case, suffices.
>
> "No purpose appears to be served by requiring lawyers to apply for admission to practice before a variety of different agencies. If a lawyer is qualified to practice law in any State, he would appear, *ipso facto*, to be qualified to practice before any agency except the Patent Office. Moreover, all the agencies except the Patent Office admit lawyers to practice upon substantially the same proof, that is, proof that he is a member in good standing of a State or Federal Bar. The result is that a lawyer must now go repeatedly through the same motions in order to become admitted to practice before a number of different agencies. In addition to being annoying, troublesome and expensive for lawyers, it results in expenditure by the agencies of thousands of dollars every year in order to handle the paper work relative to the mechanics of admission."

Cf. Camp v. *Herzog*, 104 F. Supp. 134, 140 (D. C. 1952).

that the motion to dismiss for lack of jurisdiction must be denied.[1]

Compliance with Section 9(b) of the Procedure Act

It has been judicially held that the Procedure Act does not apply to a proceeding brought by an agency to exclude an attorney from practice before it, and we find no merit in respondent's contention to the contrary.

In *Herman* v. *Dulles*, 205 F. 2d 715, 717 (C. A. D. C. 1953), the Court, in refusing to consider whether an agency's proceedings against an attorney complied with the requirements of that Act, stated:

> [23] "* * * *No statute creates the conditions that would make these provisions applicable to the disciplinary proceedings here involved.*
>
> "Section 6, 60 Stat. 240, 5 U. S. C. A. § 1005, deals with 'Ancillary matters' including, in paragraph (a), 'Appearance.' It provides that persons compelled to appear before an agency may be accompanied and represented by 'counsel.' It does not regulate the qualifications of counsel or provide how agencies may regulate them. During debate on the bill Senator McCarran read with approval the Attorney General's statement that § 6(a) 'does not deal with, or in any way qualify, the present power of an agency to regulate practice at its bar.' Administrative Procedure Act, Legislative History, 79th

[1] We cannot accept respondent's contention that public policy requires that we refer this matter to the local bar association. This Commission, as well as many other administrative agencies, has had in effect for many years rules of practice for the admission and exclusion of attorneys, and proceedings of the instant type have been upheld by the Courts. We see no reason of law or public policy to depart from established procedure in the case of respondent.

Cong., 2d Sess., Sen. Doc. 248, p. 317. Bills to regulate admissions and disciplinary proceedings in administrative agencies have been introduced but not passed. These include H. R. 8201, 81st Cong., 2d. Sess., and H. R. 3097, 82nd Cong., 1st Sess. '*It is clear * * * that the existing powers of the agencies to control practice before them are not changed by the Administrative Procedure Act.*' Attorney General's Manual on the Administrative Procedure Act, 1947, p. 66." (Emphasis added).[1]

We therefore conclude that the supplemental motion to dismiss for failure to comply with Section 9(b) of the Procedure Act must also be denied.

Request for Extension of Time

Respondent has requested that if his motions to dismiss are not granted, the time for the service of his answer be extended to 10 days after notice of our action. We shall extend [24] to July 1, 1957 the time to file an answer, and the date for hearing heretofore postponed to June 24, 1957 will be further postponed to July 8, 1957.

Accordingly, IT IS ORDERED that the motion and the supplemental motion to dismiss this proceeding filed by respondent be, and they hereby are, denied.

IT IS FURTHER ORDERED that the time in which respondent may file with the Secretary of the Commission his answer

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[1] It may also be noted that, even aside from the inapplicability of the Procedure Act to this proceeding, the situation presented by the facts alleged in the order for proceeding is of the type contemplated by the specific exceptions of Section 9(b) of that Act with respect to cases of willfulness and where the public interest requires. *Cf. Sterling Securities Co.*, Securities Exchange Act Release No. 5527 (June 5, 1957).

to the matters specified in Paragraph II of the notice and order of May 6, 1957, be, and it hereby is, extended to July 1, 1957 and that the private hearing in this matter heretofore scheduled for June 10, 1957 and postponed to June 24, 1957 be, and it hereby is, further postponed to July 8, 1957 at 10:00 A. M., E. D. S. T., at the office of the Securities and Exchange Commission, 425 Second Street, N. W., Washington 25, D. C.

By the Commission (Acting Chairman Orrick and Commissioners Patterson, Hastings, and Sargent).

For Orval L. DuBois
Secretary

By Nellye A. Thorsen
Assistant Secretary

Notice of Application for Preliminary Injunction and Temporary Restraining Order

Filed
Jun 26 1957
Harry M. Hull, Clerk

[25] UNITED STATES DISTRICT COURT

District of Columbia

[Same Title]

Please take notice that the plaintiff, Morris Mac Schwebel, by his attorney of record, will make application to the Judge sitting in Motions Court on the 1st day of July, 1957, at 10:00 A. M., for a preliminary injunction

Notice of Application for Preliminary Injunction and Temporary Restraining Order

restraining the defendants, Andrew D. Orrick, Harold C. Patterson, Earl F. Hastings and James C. Sargent, and each of them, their agents and employees, and all others acting under their direction, from:

(a) Further prosecuting the disciplinary proceeding now pending against plaintiff before the Securities and Exchange Commission entitled "In the Matter of Morris Mac Schwebel—Rule II(e), Rules of Practice—File No. 4-89",

(b) Continuing in effect defendants' "Notice of and Order for Private Hearing Pursuant to Rule II(e) of the Rules of Practice", dated May 6, 1957, in the matter of Morris Mac Schwebel,

(c) Prosecuting any other disciplinary proceeding [26] against plaintiff pursuant to any rules or regulations not authorized by law,

according to the complaint herein and the affidavits filed in support of this motion, copies of which have heretofore been served upon said defendants.

And that at the same time and place and pending the hearing and determination of said application for a preliminary injunction, the plaintiff will ask the Court to issue a temporary restraining order in accordance with Federal Rules of Civil Procedure.

This 25th day of June, 1957.

/s/ Alexander B. Hawes,
Attorney for Plaintiff,
Fowler, Leva, Hawes & Symington,
1701 K Street Building,
Washington 6,
District of Columbia.

Notice of Application for Preliminary Injunction and Temporary Restraining Order

/s/ CHESTER T. LANE,
Attorney for Plaintiff,
Beer, Richards, Lane, Haller & Buttenwieser,
150 Broadway,
New York 38, New York.

To:

THOMAS G. MEEKER, Esq.,
Attorney for Defendants,
Securities and Exchange Commission,
425 Second Street, N.W.,
Washington 25,
District of Columbia.

Certificate of Service

Filed
Jun 26 1957
Harry M. Hull, Clerk

[27] UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

[SAME TITLE]

I, Alexander B. Hawes, Attorney for plaintiff in the above-entitled action, hereby certify that on the 26th day of June, 1957, I served the attached Notice of Application for Preliminary Injunction and Temporary Restraining Order, Affidavit and Supplemental Affidavit in support thereof, and Points and Authorities in the form of a memorandum, upon Thomas G. Meeker, Esq., Attorney for Defendants, the United States District Attorney for the District of Columbia, and the Attorney General of the United States, by causing copies thereof to be delivered by hand at their respective offices.

/s/ ALEXANDER B. HAWES,
Attorney for Plaintiff.

Affidavit of Chester T. Lane in Support of Motion for Preliminary Injunction

Filed
Jun 26 1957
Harry M. Hull, Clerk

[28] UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CHESTER T. LANE, being duly sworn, says:

I am an attorney duly admitted to the Bars of the District of Columbia and the State of New York, and a member of the firm of Beer, Richards, Lane, Haller & Buttenwieser, of 150 Broadway, City of New York, State of New York, attorneys for the plaintiff herein.

This affidavit is made in support of an application for a preliminary injunction pending trial of the above entitled civil action, which was brought to secure a permanent injunction and a declaratory judgment against four individual defendants, who at the present time comprise the only members of the Securities and Exchange Commission, an agency of the United States Government. The action seeks to enjoin the maintenance of a disciplinary proceeding instituted by the Commissioners against the plaintiff, an attorney at law duly admitted to the Bar of the State of New York.

A brief statement of background is required. In [29] late 1956 the Securities and Exchange Commission initiated

what are commonly known as "delisting proceedings" against two Canadian oil companies, charging that certain reports filed by them under Section 13 of the Securities Exchange Act of 1934 contained false and misleading statements. After hearing, the Commission on April 8, 1957, directed that the registrations of the securities of the two companies on the American Stock Exchange be withdrawn (*In the Matter of Great Sweet Grass Oils, Ltd., and Kroy Oils, Ltd.*—Securities Exchange Act Release No. 5483, April 8, 1957).

Plaintiff herein, as he testified at the hearings in the *Great Sweet Grass* case, had served at certain times in 1955 and 1956 as American counsel to the Great Sweet Grass and Kroy companies, giving them upon occasion legal advice on the application of the American securities laws, and serving as transmittal agent for certain of their reports to the Securities and Exchange Commission. In the same period plaintiff had from time to time served as attorney or legal adviser to certain American securities dealers engaged in trading in the stocks of the two companies.

Following the completion of the *Great Sweet Grass* proceedings, a "Notice of and Order for Hearing" was issued by the Commission, directed to the plaintiff, charging that in connection with his representation of the oil companies and the securities dealers above mentioned he had engaged in certain specific activities or inactivities which in the Commission's view constituted unethical and unprofessional conduct. The order fixed a date for a private hearing on whether the charges were [30] well founded and if so whether plaintiff should be temporarily or permanently disqualified from appearing or practicing before the Commission pursuant to Rule II (e) of its Rules of Practice. Copies of the order and of Rule II (e) are annexed to the complaint herein as Exhibits A and B, respectively.

Affidavit of Chester T. Lane

My firm was retained to represent respondent in that proceeding—the plaintiff here—on May 16, 1957. After a preliminary study of the case (the record of the *Great Sweet Grass Oils, Ltd., and Kroy Oils, Ltd.*, proceedings, out of which the disciplinary proceeding against plaintiff herein arose, comprises some 3,200 pages of testimony and over 8 volumes of exhibits), I telephoned the General Counsel to the Commission on Friday, May 24th, to discuss the possibility of adjournment, both because of the voluminousness of the record and because of serious jurisdictional questions. He suggested that I come to Washington on the following Wednesday, May 29th. On that day I appeared before the Commission *en banc* to request a postponement of the commencement of the hearing, then set for June 10, 1957. I explained to the Commission that I intended to move before the Commission to dismiss the disciplinary proceeding for lack of jurisdiction, and if that were denied I intended to resort to a civil action against the Commissioners in this Court for an injunction against further prosecution of the disciplinary proceeding, and a declaratory judgment that the Commission was without authority in law to initiate it. I requested an adjournment of the disciplinary proceeding until the Fall, or at least until the jurisdictional questions could be settled in orderly fashion, and gave my assurances to proceed promptly to that end.

[31] The Commission granted my request only to the extent of adjourning the hearing from June 10 to June 24, 1957, and extending my client's time to answer the charges set forth in the Commission's notice and order for a private hearing from June 3 to June 10, 1957.

Thereafter, on June 7, 1957, I mailed to the Commission a motion, with supporting memorandum, on behalf of plaintiff herein for dismissal of the disciplinary proceeding. A

copy of the motion is attached to the complaint herein as Exhibit C. On June 14, 1957, I mailed to the Commission a supplemental motion, with supporting memorandum, to dismiss on a ground not mentioned in the initial motion. A copy of the supplemental motion is attached to the complaint herein as Exhibit D.

On June 20, 1957, the Commission issued and had mailed to me an "Opinion and Order Denying Motions," a copy of which is attached to the complaint as Exhibit E. In addition to denying the motions, this Order extended plaintiff's time to file his answer in the disciplinary proceeding to July 1, 1957, and adjourned the date of the commencement of the hearings to July 8, 1957.

This action was begun by the filing of the complaint with the Clerk of this Court on June 24, 1957. The Marshal was requested to effect service not only on the four individual Commissioners, but also on the Attorney General of the United States and the United States Attorney for the District of Columbia. No answers have as yet been filed or served.

Briefly stated, the grounds for relief set forth in the complaint are that the Commission is without authority in law to institute the pending disciplinary proceeding against this plaintiff or to issue any order disciplining him, that the Commssion threatens to [32] prosecute such proceeding, and that unless this Court intervenes by exercising its equitable jurisdiction to enjoin the proceeding the plaintiff herein will suffer irreparable injury and damage. The complaint further demands that the Court declare that the Commission is without authority to initiate or prosecute the proceeding.

The legal considerations and authorities bearing on plaintiff's right to relief in this action are fully developed in my memorandum of law being filed and served with the

motion for preliminary injunction and this affidavit. As there shown, the issues presented in the action are far from frivolous, but rather are of the utmost gravity. The Commission seeks, in effect, to "disbar" from practice before it an attorney duly licensed to practice law in the highest court of the State of New York—without having established any bar of its own from which to disbar him. The propriety of such action has never been judicially sustained, and indeed has been seriously questioned in at least one prior decision of this Court. Moreover, my supplemental motion before the Commission, and the complaint herein, raise the question whether, assuming that the Commission enjoys authority to enter a disbarment order in such circumstances, it may institute proceedings to that end without first having called to the attention of the respondent in writing facts or conduct which in its judgment may warrant the entry of an order of the type proposed—as required by the plain language of Section 9 (b) of the Administrative Procedure Act. This question has, so far as I am aware, not hitherto been posed or decided in any court.

[33] I am aware of the ordinary reluctance of the courts to interfere with proceedings of administrative agencies prior to their termination, even when jurisdiction over the subject matter is called in question. But, in principle, permitting agency hearings to continue for the purpose of developing facts which may help determine the issue of jurisdiction is very different from permitting them to continue when the basic question is whether the agency has met statutory conditions for initiating the hearings at all.

Manifestly, if my contentions as to the Commission's lack of jurisdiction are sound in law, insistence that while their soundness is being considered by the Court plaintiff should nevertheless appear and defend his professional

reputation, ability and integrity before a body incompetent to question or inquire into these qualities would subject plaintiff to great and unnecessary and irreparable expense and damage. On the other hand, no comparable injury to the defendants can occur by reason of their being required to stay their hands until the question of their competence to try the plaintiff's professional character is determined, if ever, in their favor. Accordingly, a preliminary injunction should issue as demanded in the complaint.

Morecver, at the argument of this motion I shall also move the Court that pending its determination and until the expiration of ten days thereafter the defendants be temporarily restrained from proceeding with the hearing now set for July 8, 1957, and from imposing any adverse consequences on plaintiff for failure to file an answer to [34] the Commission's charges within the time fixed by the Order of June 20, 1957 (i.e., on or before July 1, 1957).

/s/ CHESTER T. LANE.

(Sworn to June 24, 1957.)

Supplemental Affidavit of Chester T. Lane in Support of Motion for Preliminary Injunction

[35] UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Filed
Jun 26 1957
Harry M. Hull, Clerk

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CHESTER T. LANE, being duly sworn, says:

I am an attorney, duly admitted to the Bars of the District of Columbia and the State of New York, and a member of the firm of Beer, Richards, Lane, Haller & Buttenwieser, attorneys for the plaintiff herein.

In my affidavit verified June 24, 1957, I set forth some of the background of the disciplinary proceeding instituted by the Securities and Exchange Commission against the plaintiff. My present affidavit is designed to show the Court in greater detail the nature of the charges which have been laid against the plaintiff, and the apparent purpose of the Commission in pressing them. In particular it is designed to show the basis of plaintiff's contention that this case is peculiarly one for the application of the protective provisions of Section 9(b) of the Administrative Procedure Act.

[36] As pointed out in my earlier affidavit, all of the activity or inactivity which serves as a basis of the Com-

mission's charges against plaintiff occurred in connection with his discharge of his duties as attorney for the Canadian oil companies—Great Sweet Grass Oils, Ltd., and Kroy Oils, Ltd.—and for certain American securities dealers engaged in trading in the stocks of the two companies. The facts regarding his representation of these clients were developed at length in the hearings which led to the delisting of the companies' stock under Section 19(a)(2) of the Securities Exchange Act of 1934, principally out of the testimony of plaintiff himself and two lawyers associated with him in his office. I have carefully reviewed not only the testimony of plaintiff and his associates but also the entire transcript of 3230 pages (though not all the exhibits have been made available to me). Based upon this review, and giving particular attention to the questions of Government counsel at the hearings and the comments of the Commissioners at the oral argument, I am prepared to state that the Commission's charges in its Notice of and Order for Hearing rest in principal part on one or more of the following propositions:

(a) When one lawyer is retained by another lawyer as an expert to furnish a legal opinion on a given state of facts for use by the retaining lawyer's client in a governmental report, it is unethical and improper professional conduct on the part of the lawyer so [37] retained to rely upon the statement of facts furnished him by the retaining lawyer, even though he does not know and has no reason to know that the facts have been incorrectly stated to him.

(b) The same is true when the specialist lawyer is retained directly by the client and furnished by him with the facts on which the opinion is to be based.

(c) When in such a case facts later develop which, if they became known to the retained lawyer, would

give him reason to doubt the soundness of his original opinion, he must at all costs, and at the risk of being charged with unethical and improper professional conduct, assume the burden of ascertaining those facts and notifying the Government of his changed opinion, even if at the time there exists no lawyer-client relationship.

(d) When a lawyer who has filed a report with the Government on behalf of a client receives an informal *request* from the Government that his client furnish additional information, it is unethical and improper professional conduct for the lawyer to fail to procure such information, regardless of whether in his legal opinion the Government is justified in its request.

[38] (e) When a lawyer who has filed a report with the Government on behalf of a client learns that some of the information contained therein is inaccurate, his professional responsibility is not satisfied by diligent efforts to secure correction by his client; it is unethical and improper professional conduct to fail at the same time to notify the Government.

(f) The Securities and Exchange Commission has had for many years outstanding a rule (Rule 133) the effect of which is to exempt from registration under the Securities Act of 1933 the issuance of certain securities put out in the course of certain transactions of corporate reorganization, acquisitions of assets and the like. In its opinion in the *Great Sweet Grass* case, issued on April 8, 1957, the Commission announced for the first time certain important limitations in its interpretation of the rule, holding it inapplicable to certain specific types

of situations theretofore understood by the Bar to fall within it. Failure to have anticipated this change of position and to have advised clients accordingly many months beforehand constitutes unethical [39] and improper professional conduct.*

The purpose of the foregoing analysis of the nature of the Commission's charges against the plaintiff is not to lead the Court into consideration of the merits of the charges, but to indicate the rather novel nature of the standards of professional conduct which the Commission would, through this proceeding, impose upon practitioners. The institution of such a proceeding as this (although not this particular one) has been expected for some time by attorneys specializing in work under the federal securities laws. An intimation of the Commission's developing attitude was conveyed as long ago as last September at a "Briefing Conference" in Washington, D. C., arranged by the Bureau of National Affairs and the Federal Bar Association, at which Securities and Exchange Commissioners and top staff officials were invited to express their views on current problems of S.E.C. policy and practice before a group of attorneys and others specializing in the field. Because of my own interest in the field I attended the conference and, as it was understood that no record was being kept, I made notes for my own use. In my notes of the remarks of Mr.

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* Specification No. 9, the only one not resting on one or more of the foregoing propositions, gives a misleading impression of the record. There is no evidence that plaintiff ever knew that the order he placed was for the account of Eurobrasil Trust, and the person with whom the order was placed testified that he received the information from someone else. As soon as he heard of the testimony in question, plaintiff notified the Commission that he had transmitted the order at the request of another, and had never learned for whose account it had been placed.

Supplemental Affidavit of Chester T. Lane

Byron D. Woodside, Director of the Commission's Division of Corporation Finance, given on September 13, 1956, I find the following:

> [40] Rule 133—No sale: unanimous staff view that it should be repealed—likely to be proposed in a few months.
>
> What is proper role of attorney?
>
> Dislikes attitude of practicing lawyer that all he has to do is present client's view. Should be financial analysts and should view the problem as a whole. Appalling how often the attorney doesn't know the facts. More cross-examination of clients. Comm. has right to look to attorneys for help as much as to accountants.
>
> Also regrets ignoring of old principles.

It is an interesting fact that shortly after this Briefing Conference the Commission did, as Mr. Woodside had predicted, propose publicly that its Rule 133 be repealed. A public hearing was held on the proposal on January 17, 1957, at which representatives of the American Bar Association and The Association of the Bar of the City of New York appeared in opposition. The opposition of the latter organization, which I represented at the hearing as Chairman of its Administrative Law Committee,* was based upon a belief that an interpretative Rule which had stood in one form or another for more than twenty years as an authoritative exposition of the meaning of the law ought not to be repealed by administrative fiat, but rather should be referred to the Congress for reconsideration. Following

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* This was many weeks before I became acquainted with my present client, or acquired any information about the *Great Sweet Grass* case.

the hearing the Commission, in its Release No. 3761 dated March 15, 1957, anounced that "it does not presently contemplate adopting the revision of Rule 133 in the form announced," and in the same release [41] made public a letter to me, in my Bar Association capacity, explaining that it was among other things "considering whether to propose to the Congress at this session a statutory amendment to deal with the problem" (Securities Act Release No. 3762, March 15, 1957).

Notwithstanding this temporary abandonment by the Commission of its proposal, it would appear that the decision in the *Great Sweet Grass* case (April 6, 1957) was designed to serve as a partial repeal of the Rule by interpretation, and that the disciplinary proceeding against plaintiff is intended in part to make that repeal retroactive.

Apart from Rule 133, it is my clear recollection (though my notes do not reflect the exact words used) that Mr. Woodside expressed to the assembled group the view, at least of the staff, that attorneys practicing on behalf of clients before the Securities and Exchange Commission owed a double professional responsibility, in part to their clients, and equally to the Government. It is further my clear recollection that Mr. Woodside predicted that before long a disciplinary proceeding would be instituted to enforce recognition by the Bar of this double responsibility.

This, it would appear, is the predicted case.

CHESTER T. LANE.

(Sworn to June 25, 1957.)

Notice of Motion

Filed
Jul 5 1957
HARRY M. HULL, Clerk

[42] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[SAME TITLE]

To:

CHESTER T. LANE
STEWART W. RICHARDS
Attorneys for Plaintiff
150 Broadway
New York 38, New York

FOWLER, LEVA, HAWES & SYMINGTON
1701 K Street Building
Washington 6, D. C.

PLEASE TAKE NOTICE that the undersigned will bring the attached motion on for hearing before this Court on July 9, 1957, in the Motions Court at 10:00 o'clock, A. M., or as soon thereafter as counsel can be heard.

/s/ THOMAS G. MEEKER
General Counsel

/s/ DAVID FERBER
Assistant General Counsel

/s/ JULE B. GREENE, Attorney
Securities and Exchange Commission
425 Second Street, N. W.
Washington 25, D. C.

July 3, 1957

Motion to Dismiss

Filed
Jul 5 1957
HARRY M. HULL, Clerk

[43] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[SAME TITLE]

The defendants move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

2. To dismiss the action on the ground that the Court lacks jurisdiction over the subject matter.

Respectfully submitted,

/s/ THOMAS G. MEEKER
General Counsel

/s/ DAVID FERBER
Assistant General Counsel

/s/ JULE B. GREENE, Attorney
Securities and Exchange Commission
425 Second Street, N. W.
Washington 25, D. C.

This is to certify that:

Copy of this motion and copy of statement of points and authorities mailed to attorneys for plaintiff on July 3, 1957.

JULE B. GREENE
Attorney for Defendants.

July 3, 1957

Opinion

Filed
Jul 12 1957
HARRY M. HULL, Clerk

[44] UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1510-57

[SAME TITLE]

This case is before the court on plaintiff's motion for a preliminary injunction and temporary restraining order enjoining the members of the Securities and Exchange Commission from prosecuting the pending disciplinary proceeding, or any other disciplinary proceeding pursuant to any rules or regulations not authorized by law, against the plaintiff, and upon the Commission's motion to dismiss the complaint.

The complaint alleges that plaintiff is a member in good standing of the bar of the highest court of the State of New York; that on May 6, 1957, the defendants caused to be issued and served on him a "Notice of and Order for Private Hearing Pursuant to Rule II(e) of the Rules of Practice" of the Securities and Exchange Commission, fixing June 10 [1] as the date of hearing and giving the defendant to and including June 3 [2] within which to file an answer with the Commission. The [45] notice of hearing

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[1] The date of hearing has been postponed by the Commission until after this court's disposition of the pending motions.

[2] Subsequently extended to June 10, 1957.

contained nine specific charges of alleged "unethical and improper professional conduct" in connection with plaintiff's representation of clients in matters before the Commission, and stated that the purpose of the hearing was "to determine whether the respondent should be temporarily or permanently disqualified from and denied the privilege of appearing or practising before the Commission."

The complaint shows further that the plaintiff filed with the Commission a motion to dismiss the proceeding and a supplemental motion to dismiss, based upon substantially the same grounds as have been argued in support of his motion for preliminary injunction. On June 20, 1957, the Commission issued an opinion and order denying the motions to dismiss, whereupon this action was filed.

It is the plaintiff's contention that the Securities and Exchange Commission is without authority to maintain the pending disciplinary proceeding. Plaintiff concedes the inherent authority of all legally constituted tribunals to protect the dignity and decorum of their proceedings by expulsion for contemptuous conduct,[3] but argues that the Commission has no express statutory authority to deny, temporarily or permanently, the privilege of attorneys to practice before it; that even conceding that authority to establish a bar and to disbar for cause to be implied in the Commission's [46] statutory power "to make such rules and regulations as may be necessary for the execution of the functions vested in them"[4] the Commission has failed to implement such authority by establishing a bar;[5] and that inasmuch as the power to disbar or disqualify derives from and is corollary to the establishment of a bar in the first instance, the Commission is without authority to take any disciplinary action against him.[6] The plaintiff further

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[3] *Okin* v. *S. E. C.*, 137 F. 2d 398 (C. C. A. 2, 1943).

[4] 15 U. S. C. § 78w(a); *Herman* v. *Dulles*, 92 U. S. App. D. C. 303, 205 F. 2d 715 (1953).

[5, 6] *Camp* v. *Herzog*, 104 F. Supp. 134, 139 (D. C. D. C. 1952).

contends that, assuming the Commission does have power to suspend or disbar attorneys, any decision reached in the pending proceeding would be a nullity because the Commission has failed to comply with the notice provisions of Section 9(b) of the Administrative Procedure Act.[7]

Plaintiff argues that immediate and irreparable injury will be done to his professional good name by prosecution of the contemplated unauthorized disciplinary proceeding, which would justify equitable intervention by the court.

The defendants in their motion to dismiss contend, first, that this court is without jurisdiction to entertain the complaint because plaintiff has not exhausted his administrative remedies and because he alleges no legally cognizable injury. They contend further that, assuming the court has jurisdiction to determine at this time the legal question of the Commission's power to maintain disciplinary proceedings [47] against plaintiff, the Commission is acting under its implied power to establish a bar and to disbar therefrom, which has been implemented by Rule II(b),[8] establishing a standard of professional qualification for attorneys practicing before it, and Rule II(e),[9] providing for suspension or disbarment of persons found guilty of unethical or improper professional conduct. It is their

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[7] 5 U. S. C. §§ 1001, *et seq.*

[8] Rules of Practice for the Securities and Exchange Commission, effective April 1, 1950, Rule II(b): "A person may be represented in any proceeding by an attorney at law admitted to practice before the Supreme Court of the United States, or the highest court of any State or Territory of the United States, or the Court of Appeals or the District Court of the United States for the District of Columbia."

[9] Rule II(e): "The Commission may disqualify, and deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after hearing in the matter

(1) not to possess the requisite qualifications to represent others; or

(2) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct."

further position that none of the provisions of the Administrative Procedure Act are applicable to disciplinary proceedings against attorneys practicing before government agencies, and therefore no notice under Section 9(b) was required.

It is elementary law that as a general rule administrative remedies must first be exhausted before one aggrieved is entitled to court review;[10] but this wise rule is not without exceptions necessary to preserve the fundamental rights of the litigant or to prevent a violation of express statutory limitations placed by the Congress upon [48] the powers or actions of an administrative body.[11] "A determination of administrative authority may • • • be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that his need is sufficiently compelling to justify judicial intervention even before the completion of the administrative process."[12] Counsel for the government concedes that a case where it is clearly apparent that the administrative body is attempting to act entirely outside its lawful jurisdiction would fall within the exception to the general rule.

It is also clear that the mere fact that one is subjected to litigation or administrative proceedings ordinarily results in no legally cognizable injury, the expense and annoyance of litigation being a part of the social burden of living under government. As stated by the Supreme Court, "once the right of the Government to hold administrative hearings is established, a litigant cannot enjoin them merely because they might • • • be inconvenient or embarrassing."[13]

Mindful of these basic principles, the court concludes that this case does present an exceptional situation in

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[10] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938).

[11] *Chambers* v. *Robertson*, 87 U. S. App. D. C. 91, 93, 183 F. 2d 144, 146 (1950), reversed on the merits 341 U. S. 37.

[12] *Eccles* v. *Peoples Bank*, 333 U. S. 434 (1948).

[13] *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 540 (1954).

which the court has jurisdiction to determine the purely legal question of the Commission's authority to maintain the pending disciplinary proceedings against plaintiff, without requiring him to exhaust his administrative remedies, [49] because of the peculiar delicacy of an attorney's good reputation, his chief asset in his profession, and the fact that some members of the public may assume guilt from disbarment proceedings despite final exoneration. The fact that plaintiff's own publication of the pendency of disciplinary proceedings against him by his filing of this action may have caused greater damage to his reputation than would stem from the holding of the private hearing proposed by the Commission, has no bearing on his right to a determination of the jurisdictional question, although it would be an element to be weighed by the court should it reach consideration of the equities on the issue of injunction.

In the exercise of its jurisdiction to determine the legal question of the authority of the administrative body to maintain the threatened action, the court holds that the Securities and Exchange Commission has implied authority under its general statutory power to make rules and regulations necesary for the execution of its functions [14] to establish qualifications for attorneys practicing before it and to take disciplinary action against attorneys found guilty of unethical or improper professional conduct,[15] and that the Commission has adequately implemented this authority by its Rule II(b) and (e).[16] It is not essential that a roster of the bar be maintained, but is sufficient that the Commission has prescribed by regulation the qualifications for admission to practice before it.[17]

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[14] 15 U. S. C. § 78w(a).

[15] *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 107 (1926); *Herman* v. *Dulles*, *supra*.

[16] See notes 8 and 9, *supra*.

[17] *Camp* v. *Herzog*, *supra*.

[50] As to the applicability of the notice provision of § 9(b) of the Administrative Procedure Act,[18] the term "license" as defined in § 2(e) of the Act [19] is broad enough to cover the right to practice before a government agency, which is a "form of permission" granted by the agency. Section 9(b), which deals with "any case in which application is made for a license required by law" "in the exercise of any power or authority" and revocation thereof, would therefore appear to be applicable to proceedings looking to suspension or revocation of an attorney's permission to practice before a government agency. To so hold is not in conflict with the decision of our Court of Appeals in *Herman* v. *Dulles*, supra, that Sections 5, 7, and 8 of the Administrative Procedure Act (5 U. S. C. §§ 1004, 1006, 1007) are inapplicable to such disciplinary proceedings. In that opinion the court quoted the statement of the Attorney General, read with approval by Senator McCarran during the debate on the Act, that § 6(a) "does not deal with, or in any way qualify, the present power of an agency to regulate practice at its bar." The requirement of notice prior to revocation of permission to practice, pursuant to § 9(b), would not qualify or change the agency's power to revoke authorization to practice.

[51] Whether or not § 9(b) applies to such revocation proceedings, the result in the case at bar is the same, for the court concludes that, at the very least, charge

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[18] "(b) * * * Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements * * *." 5 U. S. C. § 1008(b).

[19] "(e) 'License' includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission * * *." 5 U. S. C. § 1001(e).

"9" [20] falls within the class of cases involving "willfulness", which are excepted from the notice requirement. "Willfulness" as used therein has been interpreted as meaning the intentional doing of the act charged.[21] Following the rule applicable to an indictment,[22] the court holds that it is not essential for a specification of misconduct to include the word "willful" or "willfully" in order to charge a willful act if knowledge and intent are implicit in the facts recited. Although none of the nine charges uses the term "willfully" the facts alleged in many of them import an intentional act of omission or commission.

Whether the intentional acts described in the various charges constitute such unethical or improper professional conduct as would warrant suspension or revocation of an attorney's permission to practice before the Commission, is not a question which the court may determine in this action.

[52] Further, it would appear that the Commission has, in effect, complied with the notice requirement of § 9(b). The pertinent sentence of that section is in essence a restatement of the concept of fair play legislatively applied

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[20] "9. Respondent testified on November 29, 1956, in Commission proceedings In the Matter of Great Sweet Grass and Kroy under Section 19(a)(2) of the Exchange Act that he never heard of Eurobrasil Trust and that he had no dealings with, or transactions with anybody connected with, Eurobrasil Trust. The record in the aforesaid proceedings reflects that on April 12, 1956 respondent placed an order with a member firm of the Exchange for the purchase of 20,000 shares of Great Sweet Grass stock, which order was for the account of Eurobrasil Trust."

[21] *Great Western Food Distributors* v. *Brannan*, 201 F. 2d 476, 484 (C. C. A. 7, 1953); *Air Transport Associates* v. *C. A. B.*, 91 U. S. App. D. C. 147, 153, 199 F. 2d 181, 186 (1953), cert. den. 344 U. S. 922.

[22] *United States* v. *Reuben*, 55 F. Supp. 1 (D. C. S. C. 1944), aff. *Old Monastery* v. *United States*, 147 F. 2d 905, cert. den. 326 U. S. 734; *Howenstine* v. *United States*, 263 F. 1 (C. C. A. 9, 1920).

to administrative proceedings through the Administrative Procedure Act. It requires only that before suspension or revocation of any license the licensee shall be given written notice of the charges against him and an opportunity to meet such charges, unless willfulness of the licensee or the public interest requires summary action. No particular form or duration of notice is specified, so that a fair notice and opportunity to reply must be inferred.

Rule III (a) and (b) of the Securities and Exchange Commission, under which the defendants assumed to act and with which they complied when they served the May 6 notice on plaintiff, also provides for reasonable notice prior to the holding of any hearing before the Commission.[23] In the instant case, the proceedings for revocation were to be instituted by a private hearing set for June 10, 1957. Plaintiff [53] was served on May 6, 1957, with written notice of a private hearing "pursuant to Rule II(e) of the Commission's Rules of Practice." That notice included a statement "in writing" of the facts or

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[23] "(a) Whenever a hearing is ordered by the Commission in any proceeding, notice of such hearing shall be given by the Secretary or other duly designated officer of the Commission to each party to the proceeding. * * * Such notice shall state the time, place, and nature of the hearing and the legal authority and jurisdiction under which the hearing is to be held, and shall be accompanied by a short simple statement of the matters of fact and law to be considered and determined. * * *

"(b) The time and place for any such hearing shall be fixed with due regard for the convenience and necessity of the parties or their representatives. The notice of hearing shall be given to each party a reasonable time in advance of the hearing by personal service, by confirmed telegraphic notice or, in any proceedings other than those pursuant to Section 8 of the Securities Act of 1933, by registered mail addressed to the last known address of the party or his agent for service."

conduct which might warrant disciplinary action and, going beyond the notice provided in Rule III (a) and (b), gave plaintiff to and including June 3 within which to file a written answer, which was an opportunity "to demonstrate * * * compliance with all lawful requirements." It would therefore appear that plaintiff has been accorded the procedural due process provided by § 9(b).

For the foregoing reasons, the court will grant the defendant's motion to dismiss the complaint, from which it follows plaintiff's motion for a preliminary injunction and temporary restraining order is denied. Counsel will prepare and present promptly an appropriate order.

(Signed) R. B. Keech,
Judge.

July 12, 1957.

Order and Judgment

Filed
Jul 18 1957
HARRY M. HULL, Clerk

[54] UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[SAME TITLE]

This cause having come on to be heard on July 9, 1957, on the plaintiff's motion for a preliminary injunction and defendants' motion for an order to dismiss the action herein,

Now, upon considering the said motions, the complaint herein and the briefs and affidavits submitted by the parties, and the Court having heard the oral argument of Chester T. Lane, Esquire, of counsel to the plaintiff, and David Ferber, Esquire, and Jule B. Greene, Esquire, of counsel to the defendants, for the reasons set forth in the opinion rendered herein July 12, 1957, it is hereby

ORDERED, ADJUDGED AND DECREED that the said motion of defendants be and the same is hereby granted from which it follows that the plaintiff's motion is denied, and the action herein be and is hereby dismissed.

/s/ R. B. KEECH,
United States District Judge.

Dated: July 18th, 1957.

Notice of Appeal

Filed
Jul 26 1957
HARRY M. HULL, Clerk

[55] UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[SAME TITLE]

NOTICE IS HEREBY GIVEN, That Morris Mac Schwebel, plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order and judgment granting defendants' motion to dismiss and denying plaintiff's motion for a preliminary injunction and dismissing the action, entered in this action on July 18, 1957.

/s/ ALEXANDER B. HAWES
1701 K Street Building
Washington 6, D. C.

/s/ CHESTER T. LANE
150 Broadway
New York 38, New York

Attorneys for Plaintiff

THOMAS MEEKER, Esq.
General Counsel
Securities & Exchange Commission
425 Second Street, N. W.
Washington 25, D. C.